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1064  
United States 1064

# Circuit Court of Appeals

For the Ninth Circuit.

RIALTO IRRIGATION DISTRICT, a Corporation,  
Plaintiff in Error,

vs.

N. W. STOWELL,

Defendant in Error,

and

N. W. STOWELL,

Plaintiff in Error,

vs.

RIALTO IRRIGATION DISTRICT, a Corporation,  
Defendant in Error.

## Transcript of Record.

Upon Writ of Error and Cross-Writ of Error to the  
United States District Court for the South-  
ern District of California,  
Southern Division.

**Filed**

OCT 29 1914

**F. D. Monckton,**  
Clerk.







# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, Southern  
District of California, Southern Division.*

No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

**Writ of Error [Sued Out by Rialto Irrigation  
District (Original)].**

United States of America,—ss.

The President of the United States, to the Honorable  
the Judge of the District Court of the United  
States, for the Southern District of California,  
Southern Division, Greeting:

Because in the record and proceedings, as also in  
the rendition of the judgment of a cause which is in  
the said District Court before you at the July, 1913,  
term thereof, wherein Rialto Irrigation District is  
plaintiff in error, and N. W. Stowell defendant in  
error, and wherein N. W. Stowell was plaintiff and  
Rialto Irrigation District was defendant, manifest  
error hath happened to the great damage of said  
plaintiff in error, as by its complaint appears;

We, being willing that error, if any hath been,  
should be duly corrected, and full and speedy jus-  
tice done to the parties aforesaid in this behalf, do  
command you, if judgment be therein given, that  
then under your seal, distinctly and openly, you send

the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 14th day of April next, in the said United States Circuit Court of Appeals, to be then and there held, to the end that the record and proceedings [5\*] aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 17 day of March, in the year of our Lord one thousand nine hundred and fourteen.

[Seal]

WM. M. VAN DYKE,

Clerk of the United States District Court for the Southern District of California, Southern Division.

By Chas. N. Williams,  
Deputy Clerk.

Allowed by OLIN WELLBORN,  
District Judge.

I hereby certify that a copy of the within Writ of Error was, on the 17th day of March, 1914, lodged in the clerk's office of the District Court of the United States, Southern District of California,

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\*Page-number appearing at foot of page of original certified Record.

Southern Division, for the said plaintiff in error.

WM. M. VAN DYKE,

Clerk, U. S. District Court, Southern District of  
California, Southern Division.

By Chas. N. Williams,

Deputy Clerk. [6]

[Endorsed]: No. 1419. In the United States District Court, Ninth Circuit, Southern District of California. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, Defendant. Writ of Error. Filed Mar. 17, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [7]

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*In the District Court of the United States, Southern  
District of California, Southern Division.*

No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

**Citation on Writ of Error [Sued Out by Rialto  
Irrigation District (Original)].**

United States of America—ss.

To N. W. Stowell, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, in the State of California, on the 14 day of April, A. D. 1914, pursuant to a writ of



error on file in the clerk's office of the District Court of the United States, for the Southern District of California, Southern Division, in that certain action No. 1419, wherein the Rialto Irrigation District is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said Rialto Irrigation District, in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable OLIN WELLBORN, United States District Judge, for the Southern District of California, Southern Division, this 17th day of March, 1914, and of the Independence of the United States the one hundred and thirty-eighth.

OLIN WELLBORN,

United States District Judge for the Southern District of California, Southern Division. [8]

[Endorsed]: No. 1419. In the United States District Court, Ninth Circuit, Southern District of California. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, Defendant. Citation on Writ of Error. Received Copy of the Within Citation, and Waive Service of Writ of Error Herein this — day of April, 1914. Burt Chellis, J. W. Swanwick, Attys. for Plf. and Deft. in Error. Filed Apr. 8, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [9]

**Names and Addresses of Attorneys.**

For Plaintiff in Error:

HENRY GOODCELL, Esq., Old Postoffice  
Block, San Bernardino, California; and  
F. A. LEONARD, Esq., Old Postoffice Block,  
San Bernardino, California.

For Defendant in Error:

BURT CHELLIS, Esq., Los Angeles, Cali-  
fornia; and  
J. W. SWANWICK, Esq., 1116-1118 Hi-  
bernia Building, Los Angeles, California.

[10]

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*In the District Court of the United States of Amer-  
ica, in and for the Southern District of Cali-  
fornia, Southern Division.*

C. C. No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

[11]

## [Complaint.]

*In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.*

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT, a Corporation,

Defendant.

Comes now N. W. Stowell, plaintiff, and for cause of action against said defendant above named, complains and alleges as follows, namely:

## FIRST COUNT.

## I.

That the plaintiff aforesaid, N. W. Stowell, is an inhabitant of the city of El Paso, county of El Paso, and State of Texas.

## II.

That said defendant is, and at all times hereinafter mentioned was, an irrigation district organized, incorporated and existing under and by virtue of an act of the legislature of the State of California, entitled "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, and the several acts passed by the State legislature of the State of



California amendatory of and supplemental to said act; and said irrigation district is situated wholly within the county of San Bernardino, in said State of California.

III.

That said defendant, under and pursuant to the said act of the legislature, and by its board of directors and officers [12] thereunto duly authorized, issued a bond to said district, which was and is in the words and figures following:

Bond No. 426.

UNITED STATES OF AMERICA.

\$500.00.

STATE OF CALIFORNIA.

\$500.00.

Bond of the

RIALTO IRRIGATION DISTRICT.

Total Issue: \$500,000.00.

Located in San Bernardino County, Cal.

FOR VALUE RECEIVED, the RIALTO IRRIGATION DISTRICT, a public corporation, duly organized and existing under, and pursuant to the laws of the State of California, promises to pay to the bearer hereof, at the office of the treasurer of said district, the sum of (\$500) FIVE HUNDRED DOLLARS in gold coin of the United States, at the dates and upon installments as follows; at the expiration of eleven years from date, five (5) per cent of said sum; at the expiration of twelve years from date, six (6) per cent of said sum; at the expiration of thirteen years from date, seven (7) per cent of

said sum; at the expiration of fourteen years from date, eight (8) per cent of said sum; at the expiration of fifteen years from date, nine (9) per cent of said sum; at the expiration of sixteen years from date, ten (10) per cent of said sum; at the expiration of seventeen years from date, eleven (11) per cent of said sum; at the expiration of eighteen years from date, thirteen (13) per cent of said sum; at the expiration of nineteen years from date, fifteen (15) per cent of said sum; at the expiration of the twentieth year from date, a percentage sufficient to pay off said sum in full.

Said installments are to be paid as provided in, and only upon the surrender of the respective installment coupons, hereto attached. And said district promises to pay interest on the said principal at the rate of (6) six per cent per annum, payable in gold coin of the United States at the office of the treasurer of [13] said district semi-annually, on the first day of January and July, of each year upon the surrender of the respective interest coupons hereto attached. Both principal and interest are payable at par.

This bond is one of a series of bonds amounting in the aggregate to FIVE HUNDRED THOUSAND DOLLARS caused to be issued by the board of directors of said Rialto Irrigation District, and pursuant to a vote of the electors of said district at an election held for that purpose on the 15th day of November, 1890. The said series, of which this bond is one, is composed of one thousand bonds, each of the denomination of Five Hundred Dollars, and

said bonds are issued by authority of, pursuant to, and after a full compliance with all the requirements of the act of the Legislature of the State of California, entitled "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes." Approved March 7, 1887, and the acts amendatory and supplementary thereto.

The Rialto Irrigation District is composed of citrus producing lands divided into ten and twenty acre farms, irrigated by one thousand (1000) inches of water measured under a four inch pressure piped to each farm lot. All the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon the real property of the district, which tax is, and the said bonds are, by said act of the Legislature made a lien upon all said real property.

IN WITNESS WHEREOF said RIALTO IRRIGATION DISTRICT has caused these bonds to be issued and signed by its President and Secretary, and its corporate seal to be hereunto affixed, and the lithographed signature of its Secretary to be affixed to each of said coupons at the office of the Board of Directors in said district, this 17th day of November, A. D. 1890. [14]

RIALTO IRRIGATION DISTRICT.

By A. B. FOWLER,  
President of Said Board.

By D. ROBINSON,  
Secretary of Said Board.

[Seal of Rialto Irrigation District.]



## IV.

That attached to said bond was, at the time of the issuance thereof, as aforesaid, a certain coupon No. 9, which said coupon was and is in the words and figures following, to wit:

\$15.00

RIALTO

No. 9

IRRIGATION DISTRICT

will pay

to the bearer at the

Office of the Treasurer of said District at the Town of Rialto, County of San Bernardino, State of California on JULY 1st, 1895, on surrender of this coupon the sum of

FIFTEEN DOLLARS

in U. S. Gold Coin being semi-annual interest on Bond No. 426.

D. ROBINSON,

Secretary.

Dated Nov. 17, 1890.

## V.

That attached to said bond, was, at the time of the issuance thereof, as aforesaid, a certain installment coupon No. 1, which said coupon was and is in the words and figures following, to wit:

\$25.00

RIALTO

No. 1.

IRRIGATION DISTRICT

will pay

to the bearer at the

Office of the Treasurer of said District at the Town of Rialto, County of San Bernardino, State of California, on Jany. 1st, 1902, on surrender of this coupon the sum of

**TWENTY-FIVE DOLLARS [15]**

in U. S. Gold Coin being 1st installment of Principal on bond of said district. Interest on said installment will cease after maturity.

D. ROBINSON,  
Secretary.

No. 426.

Dated Nov. 17, 1890.

**VI.**

That the apparent date of said bonds and coupons was, and is November 17, 1890, but that the said bonds and coupons were made payable as of the date of Jan. 1st, 1891, and bore interest from that date only; and that each and all of the interest coupons are for interest accruing on said bonds, in semi-annual installments, from Jan. 1st and July 1st of each year; and that the installments of principal fall due thereon beginning with Jan. 1st, 1902, and at the expiration of eleven years from Jan. 1st, 1891.

**VII.**

That subsequent to the issuance of said bond and coupons and prior to the commencement of this action, this plaintiff, did, in good faith, and in the ordinary course of business, and for value before the apparent maturity of the said bond or coupons, and without knowledge of their actual dishonor or any defense thereto, if any such existed, purchase said bond and also the coupons thereto attached including interest coupon No. 9 and installment coupon No. 1 hereinbefore described, and ever since has been and now is the owner and holder of said bond and all of said coupons.

## VIII.

That said interest coupon No. 9 has not been paid, nor has any part thereof been paid; that there is now due and unpaid to the plaintiff on said coupon the sum of \$15.00 with interest thereon at the rate of 7% per annum from the first day of July, 1895.  
[16]

## IX.

That said installment coupon No. 1 has not been paid, nor has any part thereof been paid; that there is now due and unpaid to the plaintiff on said coupon the sum of \$25.00 with interest thereon at the rate of 7% per annum from the first day of January, 1902.

## SECOND COUNT.

## I.

Repeats and makes a part hereof paragraph I and II in the previous count of this complaint, and further alleges:

## II.

That heretofore, to wit, on or about the 17th day of November, 1890, said Rialto Irrigation District, under and pursuant to the said act of the legislature of the State of California, approved March 7, 1887, and the several acts passed amendatory of and supplemental to said act, and by its Board of Directors and officers thereunto duly authorized, authorized the execution of certain bonds of said irrigation district, which said bonds were of the same tenor and effect as the bond hereinbefore set forth in the first count of this complaint, with the exception of the numbers thereof, and which said bonds were issued



thereafter on January 1st, 1891, and were respectively numbered as follows, to wit: 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473.

### III.

That there were attached to each of the aforesaid bonds, at the time of their issuance, certain interest coupons, each of which was of the same tenor and effect, and made and executed in the same form and manner as the coupon specifically described in [17] the first count of this complaint, differing only in the numbers thereof, the amount of money promised to be paid therein and date of maturity; that of said coupons all those hereinafter specifically described were, by the terms thereof, payable prior to the commencement of this action; that 1238 of said interest coupons, in addition to the interest coupon specifically described in the first count of this complaint, were, at the time of the issuance thereof, attached to the aforesaid designated bonds, as follows, to wit: to each of said bonds were attached forty-eight (48) of said interest coupons, numbered respectively 10 to 34 inclusive, and to thirty-nine (39) of said bonds numbered respectively 426 to 464 inclusive, were also attached a coupon numbered nine (9).

### IV.

That there were attached to each of the aforesaid bonds, at the time of their issuance, certain install-

ment coupons, each of which was of the same tenor and effect, and made and executed in the same form and manner as the installment coupon specifically described in the first count of this complaint, differing only in the numbers thereof, the amount of money promised to be paid therein and date of maturity; that of said installment coupons all those hereinafter specifically described were, by the terms thereof, payable prior to the commencement of this action; that 335 of said installment coupons, in addition to the installment coupon specifically described in the first count of this complaint, were, at the time of the issuance thereof, attached to the aforesaid designated bonds as follows, to wit: to each of said bonds were attached seven (7) of said installment coupons, numbered respectively, one (1) to seven (7), inclusive.

V.

That subsequent to the issuance of said bonds and coupons and prior to the commencement of this action, this plaintiff, did, [18] in good faith, and in the ordinary course of business and for value, before the apparent maturity of the said bonds or coupons and without knowledge of their actual dishonor, purchase the aforesaid 47 bonds and the aforesaid 1238 interest coupons and the aforesaid 335 installment coupons, in addition to the bond and coupons hereinbefore specifically set forth in the first count of this complaint, and ever since has been and now is the owner and holder of all of said bonds and coupons.

## VI.

Plaintiff further avers that on or after the several respective days and times when said coupons matured and became due and payable, he presented each of them to the Treasurer of said Rialto Irrigation District for payment and demanded payment thereof; each and all of his demands were then and there by said Treasurer refused.

## VII.

That said bonds and coupons have not been paid, nor has any part of any one of said bonds or coupons been paid; that there is now due, owing and unpaid on said 1238 interest coupons the sum of \$16,554, with interest thereon at the rate of seven per cent per annum from the date when each of said interest coupons respectively fell due, and there is now due, owing and unpaid on said 335 installment coupons the sum of \$13,415, with interest thereon at the rate of seven per cent (7%) per annum from the date when each of said installment coupons respectively fell due.

WHEREFORE, plaintiff prays judgment against said defendant in the sum of \$30,009.00, together with interest as aforesaid, and costs of suit.

BURT CHELLIS,

Attorney for Plaintiff.

State of California,  
County of Los Angeles,—ss.

N. W. Stowell, being first duly sworn, [19] deposes and says: That he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except matters



and things therein stated on information and belief and as to those matters he believes it to be true.

N. W. STOWELL.

Subscribed and sworn to this 25th day of June, 1908, before me:

[Seal]

ZENA B. WALES,

Notary Public, in and for the County of Los Angeles,  
State of California.

[Endorsed]: No. 1419. *Dept.* In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, a Corporation, Defendant. Filed Jun. 27, 1908. Wm. M. Van Dyke, Clerk. ———, Deputy. Burt Chellis, Atty. for Plaintiff. [20]

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**[Demurrer to Complaint.]**

*In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.*

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT, a Corporation,  
Defendant.

Defendant.

The defendant Rialto Irrigation District demurs to the complaint in this action, and to each and every count thereof, upon ground that said complaint does not, nor does each or any count thereof, state facts

sufficient to constitute any cause of action.

WHEREFORE, the defendant prays to be hence dismissed, with judgment against the plaintiff for costs.

HENRY GOODCELL,

F. A. LEONARD,

Attorneys for Defendant.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

HENRY GOODCELL,

F. A. LEONARD,

Attorneys for Defendant.

[Endorsed]: No. 1419. In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, a Corporation, Defendant. Demurrer to Complaint. Filed Oct. 9, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Henry Goodcell, F. A. Leonard, San Bernardino, Calif., Attorneys for Defendant. [21]

---

**[Order Sustaining Demurrer to Complaint, etc.]**

At a stated term, to wit, the July Term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the city of Los Angeles, on Monday, the twelfth day of July, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable OLIN WELLBORN, District Judge.

No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT, a Corpora-  
tion,

Defendant.

This cause having heretofore been submitted to the Court for its consideration and decision upon defendant's demurrer to plaintiff's complaint, and the Court having duly considered the same and being fully advised in the premises, it is now on this 12th day of July, 1909, being a day in the July Term, A. D. 1909, of said Circuit Court, ordered, that said demurrer be, and the same hereby is, sustained, to which ruling of the Court, plaintiff by his counsel, notes and is allowed an exception, which is hereby entered herein; it is further ordered on application of counsel for plaintiff, that said plaintiff have thirty days in which to amend his said complaint if so advised. [22]

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*In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.*

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT, a Corpora-  
tion,

Defendant.



**Amended Complaint.**

Comes now N. W. Stowell, plaintiff, and for cause of action against said defendant above named, complains and alleges as follows, namely:

**FIRST COUNT.**

**I.**

That the plaintiff aforesaid, N. W. Stowell, was upon the 25th day of June, 1908, now is and at all of the times hereinafter alleged, has been, a citizen of the State of Texas.

**II.**

That said defendant is, and at all times hereinafter mentioned was, an irrigation district organized, incorporated and existing under and by virtue of an act of the legislature of the State of California, entitled "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, and the several acts, passed by the state legislature of the State of California amendatory of and supplemental to said act; and said irrigation district is situated wholly within the County of San Bernardino in said State of California.

**III.**

That said defendant, under and pursuant to the said act of the legislature, and by its board of directors and officers thereunto [23] duly authorized, issued a bond of said district, which was and is in the words and figures following:

Bond No. 426.

UNITED STATES OF AMERICA.

\$500.00.

STATE OF CALIFORNIA.

\$500.00.

Bond of the

RIALTO IRRIGATION DISTRICT.

Total Issue: \$500,000.00.

Located in

San Bernardino County, Cal.

FOR VALUE RECEIVED, the RIALTO IRRIGATION DISTRICT, a public corporation, duly organized and existing under, and pursuant to the laws of the State of California, promises to pay to the bearer hereof, at the office of the treasurer of said district, the sum of (\$500) FIVE HUNDRED DOLLARS in gold coin of the United States, at the dates and upon installments as follows: at the expiration of eleven years from date, five (5) per cent of said sum; at the expiration of twelve years from date, six (6) per cent of said sum; at the expiration of thirteen years from date seven (7) per cent of said sum; at the expiration of fourteen years from date, eight (8) per cent of said sum; at the expiration of fifteen years from date, nine (9) per cent of said sum; at the expiration of sixteen years from date, ten (10) per cent of said sum; at the expiration of seventeen years from date, eleven (11) per cent of said sum; at the expiration of eighteen years from date, thirteen (13) per cent of said sum; at the expiration of nineteen years

from date, fifteen (15) per cent of said sum; and at the expiration of the twentieth year from date, a percentage sufficient to pay off said sum in full.

Said installments are to be paid as provided in, and only upon the surrender of the respective installment coupons, hereto attached. And said district promises to pay interest on the said [24] principal at the rate of (6) six per cent per annum, payable in gold coin of the United States at the office of the treasurer of said district semi-annually, on the first day of January and July of each year upon the surrender of the respective interest coupons hereto attached. Both principal and interest are payable at par.

This bond is one of a series of bonds amounting in the aggregate to FIVE HUNDRED THOUSAND DOLLARS caused to be issued by the board of directors of said Rialto Irrigation District, and pursuant to a vote of the electors of said district at an election held for that purpose on the 15th day of November, 1890. The said series, of which this bond is one, is composed of one thousand bonds, each of the denomination of Five Hundred Dollars, and said bonds are issued by authority of, pursuant to, and after a full compliance with all the requirements of the act of the Legislature of the State of California, entitled "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes." Approved March 7, 1887, and the acts amendatory and supplementary thereto.



The Rialto Irrigation District is composed of citrus producing lands divided into ten and twenty acre farms, irrigated by one thousand (1,000) inches of water measured under a four-inch pressure piped to each farm lot. All the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon the real property of the district, which tax is, and the said bonds are by said act of the legislature made a lien upon all said real property.

IN WITNESS WHEREOF said RIALTO IRRIGATION DISTRICT has caused these bonds to be issued and signed by its President and Secretary, and its corporate seal to be hereunto affixed, and the lithographed signature of its Secretary to be affixed to each of [25] said coupons at the office of the Board of Directors in said District, this 17th day of November, A. D. 1890.

RIALTO IRRIGATION DISTRICT,

By A. B. FOWLER,  
President of Said Board.

By D. ROBINSON,  
Secretary of Said Board.

[Seal of Rialto Irrigation District.]

IV.

That attached to said bond, was, at the time of the issuance thereof, as aforesaid, a certain coupon No. 9, which said coupon was and is in the words and figures following, to wit:

\$15.00

RIALTO

No. 9

IRRIGATION DISTRICT

will pay

to the bearer at the

Office of the Treasurer of said District at the Town of Rialto, County of San Bernardino, State of California, on July 1st, 1895, on surrender of this coupon the sum of

FIFTEEN DOLLARS

in U. S. Gold Coin being semi-annual interest on Bond No. 426.

D. ROBINSON,  
Secretary.

Dated Nov. 17, 1890.

V.

That attached to said bond, was, at the time of the issuance thereof, as aforesaid, a certain installment coupon No. 1, which said coupon was and is in the words and figures following, to wit:

\$25.00

RIALTO

No. 1

IRRIGATION DISTRICT

will pay

to the bearer at the [26]

Office of the Treasurer of said District at the Town of Rialto, County of San Bernardino, State of California, on Jany. 1st, 1902, on surrender of this coupon the sum of

TWENTY-FIVE DOLLARS

in U. S. Gold Coin being 1st installment of Principal

on bond of said district. Interest on said installment will cease after maturity.

D. ROBINSON,  
Secretary.

No. 426.

Dated Nov. 17, 1890.

#### VI.

That the apparent date of said bonds and coupons was, and is, November 17, 1890, but that the said bonds and coupons were made payable as of the date of Jan. 1st, 1891, and bore interest from that date only; and that each and all of the interest coupons are for interest accruing on said bonds, in semi-annual installments, from Jan. 1st and July 1st of each year; and that the installments of principal fall due thereon beginning with Jan. 1st, 1902, and at the expiration of eleven years from Jan. 1st, 1891.

#### VII.

That subsequent to the issuance of said bond and coupons and prior to the commencement of this action, this plaintiff, did, in good faith, and in the ordinary course of business, and for value before the apparent maturity of the said bond or coupons, and without knowledge of their actual dishonor or any defense thereto, if any such existed, purchase said bond and also the coupons thereto attached including interest coupon No. 9 and installment coupon No. 1 hereinbefore described, and ever since has been and now is the owner and holder of said bond and all of said coupons. [27]

#### VIII.

That said interest coupon No. 9 has not been paid,



nor has any part thereof been paid; that there is now due and unpaid to the plaintiff on said coupon the sum of \$15.00 with interest thereon at the rate of 7% per annum from the first day of July, 1895.

### IX.

That said installment coupon No. 1 has not been paid, nor has any part thereof been paid; that there is now due and unpaid to the plaintiff on said coupon the sum of \$25.00 with interest thereon at the rate of 7% per annum from the first day of January, 1902.

### X.

That the apparent date of said bonds "November 17th, 1890" could not have been the actual or real date of their issue for the reason that the meeting of the Board of Directors of the defendant corporation, at which they voted to issue said bonds in their present form, was not held until the 21st day of said November, 1890.

That said defendant corporation well knew that the date of issue of said bonds was January 1st, 1891, and in accordance with that knowledge and understanding paid the first six interest coupons that were presented for payment on all of the bonds and also paid the seventh interest coupon on a portion of the bonds, on presentation.

### XI.

That upon the 12th day of December, 1890, the Board of Directors of the defendant corporation, brought an action in the Superior Court of said County of San Bernardino, State of California, to determine the validity of said bonds; that thereafter,

to wit: upon the 3d day of January, 1891, said Superior Court, by a judgment duly given and made in said action so brought by said Board of Directors, declared said bonds to be valid. [28]

## SECOND COUNT.

### I.

Repeats and makes a part hereof paragraph I and II in the previous count of this complaint, and further alleges:

### II.

That heretofore, to wit, on or about the 17th day of November, 1890, said Rialto Irrigation District, under and pursuant to the said act of the legislature of the State of California, approved March 7, 1887, and the several acts passed amendatory of and supplemental to said act, and by its Board of Directors and officers thereunto duly authorized, authorized the execution of certain bonds of said irrigation district, which said bonds were of the same tenor and effect as the bond hereinbefore set forth in the first count of this complaint with the exception of the numbers thereof, and which said bonds were issued thereafter on January 1st, 1891, and were respectively numbered as follows, to wit: 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473.

### III.

That there were attached to each of the aforesaid bonds, at the time of their issuance certain interest coupons, each of which was of the same tenor and

effect, and made and executed in the same form and manner as the coupon specifically described in the first count of this complaint, differing only in the numbers thereof, the amount of money promised to be paid therein and date of maturity; that of said coupons all those hereinafter specifically described were, by the terms thereof, payable prior to the commencement of this action; that 1,238 of said interest coupons, in addition to the interest coupon specifically described in the [29] first count of this complaint, were, at the time of the issuance thereof, attached to the aforesaid designated bonds, as follows, to wit, to each of said bonds were attached forty-eight (48) of said interest coupons, numbered respectively 10 to 34 inclusive, and to thirty-nine (39) of said bonds numbered respectively 426 to 464, inclusive, were also attached a coupon numbered nine (9).

#### IV.

That there were attached to each of the aforesaid bonds, at the time of their issuance, certain installment coupons, each of which was of the same tenor and effect, and made and executed in the same form and manner as the installment coupon specifically described in the first count of this complaint, differing only in the numbers thereof, the amount of money promised to be paid therein and date of maturity; that of said installment coupons all those hereinafter specifically described were, by the terms thereof, payable prior to the commencement of this action; that 335 of said installment coupons, in addition to the installment coupon specifically de-



scribed in the first count of this complaint, were, at the time of the issuance thereof, attached to the aforesaid designated bonds as follows, to wit: to each of said bonds were attached (7) seven of said installment coupons, numbered respectively, one (1) to seven (7), inclusive.

#### V.

That subsequent to the issuance of said bonds and coupons, and prior to the commencement of this action, this plaintiff, did, in good faith, and in the ordinary course of business and for value, before the apparent maturity of the said bonds or coupons and without knowledge of their actual dishonor, purchase the aforesaid 47 bonds and the aforesaid 1238, interest coupons and the aforesaid 335 installment coupons, in addition to the bond and coupons hereinbefore specifically set forth in the first count of this complaint, and ever since has been and now is the [30] owner and holder of all of said bonds and coupons.

#### VI.

Plaintiff further avers that on or after the several respective days and times when said coupons matured and became due and payable, he presented each of them to the treasurer of said Rialto Irrigation District for payment and demanded payment thereof; each and all of his demands were then and there by said treasurer refused.

#### VII.

That said bonds and coupons have not been paid, nor has any part of any one of said bonds or coupons been paid; that there is now due, owing and un-

paid on said 1238 interest coupons the sum of \$16,554, with interest thereon at the rate of seven per cent per annum from the date when each of said interest coupons respectively fell due, and there is now due, owing and unpaid on said 335 installment coupons the sum of \$13,415, with interest thereon at the rate of seven per cent (7%) per annum from the date when each of said installment coupons respectively fell due.

WHEREFORE, plaintiff prays judgment against said defendant in the sum of \$30,009.00, together with interest as aforesaid, and costs of suit.

BURT CHELLIS,  
Attorney for Plaintiff.

State of California,  
County of Los Angeles,—ss.

N. W. Stowell, being first duly sworn, deposes and says: That he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except matters and things therein stated on information and belief, and as to those matters he believes it to be true.

N. W. STOWELL.

Subscribed and sworn to [31] this 22d day of November, 1909, before me:

[Seal] W. E. STOWELL,  
Notary Public, in and for the County of Los Angeles,  
State of California.

[Endorsed]: No. 1419. In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, a Corpora-

tion, Defendant. Amended Complaint. Received Copy of the Within Amended Complaint this 27th Day of December, 1909. Henry Goodcell, F. A. Leonard, Attys. for Dft. Filed Dec. 29, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Burt Chellis, Atty. for Plaintiff, 615 I. W. Hellman Bldg., L. A., F7372 Main 1086. [32]

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**[Demurrer to Amended Complaint.]**

*In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.*

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT, a Corporation,

Defendant.

The defendant Rialto Irrigation District demurs to the amended complaint in this action, and to each and every count thereof, upon the ground that said amended complaint does not, nor does each or any count thereof, state facts sufficient to constitute any cause of action.

WHEREFORE, the defendant prays to be hence dismissed, with judgment against the plaintiff for costs.

HENRY GOODCELL,  
F. A. LEONARD,  
Attorneys for Defendant.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

HENRY GOODCELL,  
F. A. LEONARD,  
Attorneys for Defendant.

[Endorsed]: No. 1419. In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, a Corporation, Defendant. Demurrer to Amended Complaint. Filed Jan. 25, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Goodcell & Leonard, Attys. for Defendant. [33]

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**[Order Overruling Demurrer to Amended  
Complaint.]**

At a stated term, to wit, the January Term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom in the city of Los Angeles, on Thursday, the twentieth day of April, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable OLIN WELLBORN, District Judge.

No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT, a Corporation,  
tion,

Defendant.



This cause having heretofore been submitted to the Court for its consideration and decision on the demurrer of defendant to the amended complaint, and the Court having duly considered the same, and being fully advised in the premises, it is now, on this 20th day of April, A. D. 1911, being a day in the January Term, A. D. 1911, of said Circuit Court, ordered, that the said demurrer to the amended complaint be, and the same hereby is overruled. [34]

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*In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.*

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT, a Corporation,

Defendant.

**Amended Answer to Amended Complaint.**

Comes now the defendant and by leave of court first had, makes this amended answer to the amended complaint in this action and to each and every cause of action therein alleged, as follows:

I.

The defendant, upon its information and belief, denies that on June 25, 1908, or at the time of the commencement of this action, or at any of the times mentioned in said amended complaint, the plaintiff was or has been, or that he now is, a citizen of the State of Texas.

## II.

Defendant admits that it was and is an irrigation district, as alleged in said amended complaint.

## III.

Admits that the board of directors and officers of the defendant, acting in the name of the defendant, issued the bonds referred to in said amended complaint; but denies that said directors and officers, or any of them, were lawfully authorized, or had lawful power, to issue said bonds, or any of them, as bonds of the defendant; and denies that said bonds or any of them were issued pursuant to the alleged act or acts of the legislature of the State of California; and [35] denies that the defendant, by or through its said board of directors and officers, or otherwise or at all, ever lawfully issued said bonds or any of them; and denies that said bonds or any of them are, or ever were, lawful or binding acts or obligations of the defendant.

## IV.

Admits that said bonds were and are in words and figures as set forth in said amended complaint, and that said bonds had attached thereto coupons for the interest and for installments of principal as alleged, and in words and figures as set forth.

## V.

Alleges that each of said bonds, at the time of its execution, had attached thereto interest coupons for the several installments of semi-annual interest that should accrue thereon, numbered successively beginning with No. 1, and that the first of said coupons was, by its terms, made payable on July 1, 1891,

for the amount of \$15.00, being the amount of the first installment of semi-annual interest, and the remainder of said coupons were, by their terms, made payable successively on January 1, and July 1 of each year from and after that date.

#### VI.

Alleges that each of said bonds, at the time of its execution, had attached thereto coupons for the several installments of principal that should become due thereon, numbered successively beginning with No. 1 and that the first of said installment coupons was, by its terms, made payable on January 1, 1902, and the remainder of said installment coupons were, by their terms made payable successively on January 1 of each year thereafter. [36]

#### VII.

Alleges that all said interest coupons were identical in form with the interest coupons set forth in said amended complaint and that all said installment coupons were identical in form with the installment coupons set forth in said amended complaint.

#### VIII.

Denies that the apparent date of said bonds and coupons, or of any of said bonds or coupons, as distinguished from their actual or true date, was or is November 17, 1890; and alleges that November 17, 1890, was and is the actual and true date of each and all of said bonds and coupons.

#### IX.

Denies that said bonds and coupons, or any of said bonds or coupons, were made payable as of the date

of January 1, 1891; and alleges that each and all of said bonds and coupons were made payable as of the date of November 17, 1890.

X.

Denies, upon information and belief, that the defendant purchased or acquired all or any of said bonds, or all or any of said interest coupons, or all or any of said installment coupons, alleged or set forth in said amended complaint, in good faith, or in the ordinary course of business or for value, or before the apparent maturity of such bond or coupon, or without knowledge of the actual dishonor of such bond or coupon, or without knowledge of any defense thereto, or that the defendant is now or ever has been the owner or holder of such bond or coupon, or of any of the bonds or coupons alleged in said amended complaint.

XI.

Admits that the meeting of the board of directors of the defendant, at which they voted to issue said bonds in their present form, was not held until November 21, 1890, but [37] denies that for that reason, the date said bonds bear, to wit, November 17, 1890, could not have been their actual or real date, and alleges that November 17, 1890, was and is the actual and real date of each and all of said bonds, and of each and all of said coupons.

XII.

Denies that the defendant well knew, or knew at all, that the date of said bonds, or any of them, was January 1, 1891, or that the date of issue of said bonds, or any of them, was January 1, 1891, and



denies that such was the date of said bonds, or any of them, and denies that such was the date of issue of said bonds, or any of them; and denies that in accordance with that knowledge or with that understanding the defendant paid any interest coupons on or pertaining to any of said bonds.

### XIII.

Admits that on December 12, 1890, the Board of Directors of the defendant brought an action in the Superior Court of the County of San Bernardino, State of California, but denies that said action was brought to determine the validity of said bonds, or any of them, and alleges that said action was brought solely for the purpose of determining the regularity and validity of certain proceedings preliminary to and providing for and authorizing an issue of bonds by the defendant; and denies that the alleged judgment in said action was duly given and made, or duly given or made; and denies that said judgment declared said bonds, or any of them, to be valid; and denies that the validity of said bonds, or any of them, was adjudged or adjudicated in said action.

### XIV.

For further answer, the defendant alleges that none of said bonds were delivered for value, or delivered [38] at all, to any purchaser or taker, on November 17, 1890, or on January 1, 1891, or at the time of their actual date or their apparent date or their alleged date, and none of them bear date at the time of their issue; that none of said bonds are negotiable in form, or in the form required by the statute under which they are alleged to have been

issued; that none of said bonds are made payable in the time prescribed by such statute; that none of said bonds were issued for a lawful consideration, but each and all of them were issued for a consideration which, wholly or in great part, consisted in the doing of construction work for the defendant; and that by reason of the facts here stated, each and all of said bonds and coupons were and are invalid and void.

### XV.

Alleges, upon information and belief, that the plaintiff, in so far as he ever purchased or acquired all or any of the bonds or coupons alleged in said amended complaint, purchased and acquired the same with notice and knowledge of each and all of the facts hereinbefore alleged.

For a second, separate and further defense to each and every of plaintiff's alleged cause of action, defendant alleges that the bonds and each of them, referred to in each of said first causes of action alleged in said complaint, did not bear date at the time of their issue nor were said bonds or any of them by their terms, made payable in the time prescribed for their payment by the Act of the Legislature of the State of California, under and in pursuance of which, it is alleged in said cause of action, said bonds were issued and defendant further alleges that said bonds and each of them were not issued for a valid, sufficient, lawful or adequate consideration. [39]

For a third, further and separate defense to each and every of plaintiff's alleged causes of action, de-

fendant alleges that each of said causes of action alleged in said complaint, as to all coupons, including both interest and principal coupons, which, by their terms, were payable four years or more before the commencement of this action, are barred by the provisions of Section 443 and by the provisions of Subdivision I of Section 337 and of Subdivision I of Section 338 of the Code of Civil Procedure of the State of California.

WHEREFORE, the defendant prays judgment that the plaintiff take nothing, and for costs.

HENRY GOODCELL,

F. A. LEONARD,

Attorneys for Defendant.

State of California,

County of San Bernardino,—ss.

S. J. Bunting, being duly sworn, on oath says: That he is the Secretary of the Rialto Irrigation District, the defendant named in the foregoing amended answer to amended complaint, and makes this affidavit on behalf of said defendant; that he has read the foregoing amended answer and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters, he believes it to be true.

[Seal]

S. J. BUNTING.

Subscribed and sworn to before me this 8th day of June, 1912.

M. A. KERR,

Notary Public in and for the County of San Bernardino, State of California. [40]

We certify that in our opinion, the foregoing amended answer, as to the whole thereof, and as to each and every cause of action referred to therein, is well founded in point of law.

HENRY GOODCELL,

F. A. LEONARD,

Attorneys for Defendant.

[Endorsed]: Original. No. 1419. In the United States Circuit Court, Ninth Circuit, Southern District of California. N. W. Stowell vs. Rialto Irrigation District, a Corp. Amended Answer to Amended Complaint. Received Copy of the Within Amd. Answer this 10th day of June, 1912. Burt Chellis, Harris & Swanwick, Attys. for Plff. Filed Jun. 10, 1912. Wm. M. Van Dyke, Clerk. By Murray C. White, Deputy Clerk. Henry Goodcell and F. A. Leonard, Postoffice Block, San Bernardino, Cal. [41]

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*In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.*

#1419.

N. W. STOWELL,

Plaintiff.

vs.

RIALTO IRRIGATION DISTRICT, a Corporation,

Defendant.



**Stipulation [Concerning Filing of Amended or Supplemental Complaint, etc.].**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties to the above-entitled action that the plaintiff may file an amended or supplemental complaint herein within 7 days from date hereof, setting up an additional cause of action based upon any coupons which were originally attached to any of the bonds owned by said plaintiff, N. W. Stowell, at the time this suit was commenced, the time of payment of which said coupons was prior to the first day of July, 1912, and not already sued upon, and that said amended and supplemental complaint may be deemed denied, and that defendants may be deemed to have filed all the defenses thereto which have been filed to any original or amended complaint heretofore filed herein.

BURT CHELLIS,

Attorney for Plaintiff.

HENRY GOODCELL and

F. A. LEONARD,

Attorneys for Defendant. [42]

Dated June 29th, 1912.

*In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.*

#1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT, a Corporation,

Defendant.

**Stipulation [Concerning Filing of Amended or Supplemental Complaint, etc.].**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties to the above-entitled action that the plaintiff may file an amended or supplemental complaint herein within — days from date hereof, setting up an additional cause of action based upon any coupons which were originally attached to any of the bonds referred to in the original or amended complaint herein, the time of payment of which said coupons having accrued subsequent to the coupons mentioned in said original or amended complaint on or prior to the 1st day of July, 1912, and that said amended and supplemental complaint may be deemed denied, and that defendants may be deemed to have filed all the defenses thereto which have been filed to any original or amended complaint heretofore filed herein.

Dated June —, 1912.

BURT CHELLIS,  
HARRIS & SWANWICK,  
Attorneys for Plaintiff.  
HENRY GOODCELL and  
F. A. LEONARD,  
Attorneys for Defendant.

[Endorsed]: C. C. No. 1419. In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, Defendant. Stipulation. Filed Jul. 5, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.  
[43]

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*In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.*

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT, a Corporation,

Defendant.

### **Supplemental Complaint.**

Leave of Court being first duly had and obtained, comes now the plaintiff and files this supplemental complaint, as follows:

#### **I.**

By adding a THIRD COUNT to said complaint, as follows, viz.:

THIRD COUNT.

I.

Repeats and makes a part hereof Paragraph I, II and II, VI, VII, X and XI in the FIRST COUNT of said complaint, and further alleges:

II.

That attached to said bond, was, at the time of the issuance thereof, as aforesaid, a certain coupon No. 35, which said coupon was and is in the words and figures following, to wit:

\$6.60

RIALTO

No. 35

IRRIGATION DISTRICT

will pay

to the bearer at the

Office of the Treasurer of said District at the Town of Rialto, County of San Bernardino, State of California, on July 1st, 1908, on surrender of this coupon the sum of

SIX 60/100 DOLLARS

in U. S. Gold Coin being semi-annual interest on Bond No. 426.

D. ROBINSON,

Secretary.

Dated Nov. 17, 1890. [44]

III.

That attached to said bond, was, at the time of the issuance thereof, as aforesaid a certain installment coupon No. 8, which said coupon was and is in the words and figures following, to wit:



\$65.00

RIALTO

No. 8

## IRRIGATION DISTRICT

will pay

to the bearer at the

Office of the Treasurer of said District at the Town of Rialto, County of San Bernardino, State of California, on Jany. 1st, 1909, on surrender of this coupon the sum of

SIXTY-FIVE DOLLARS

in U. S. Gold Coin being 1st installment of Principal on bond of said District. Interest on said installment will cease after maturity.

D. ROBINSON,

Secretary.

No. 426.

Dated Nov. 17, 1890.

## IV.

Repeats and makes a part hereof Paragraph II in SECOND COUNT of this complaint, and further alleges:

## V.

That heretofore, to wit: on or about the 17th day of November, 1890, said Rialto Irrigation District, under and pursuant to the said act of the legislature of the State of California approved March 7, 1887, and the several acts passed amendatory of and supplemental to said act, and by its Board of Directors and officers thereunto duly authorized, authorized the execution of certain bonds of said irrigation district, which said bonds were of the same tenor and effect as the bond hereinbefore set forth in the first count of this complaint, with the exception of the numbers

thereof, and which said bonds were issued [45] thereafter on January 1st, 1891, and were respectively numbered as follows, to wit: #77, 78, 234, 665, 666, 667, 798, 894, 895, 896, 989.

## VI.

That there were attached to each of the aforesaid bonds, at the time of their issuance, certain interest coupons, each of which was of the same tenor and effect, and made and executed in the same form and manner as the coupons specifically described in this complaint, as above set forth, differing only in the numbers thereof, the amount of money promised to be paid therein and date of maturity; that of said coupons all those hereinafter specifically described were, by the terms thereof, payable prior to the commencement of this action; that 577 of said interest coupons, in addition to the interest coupon specifically described in this complaint as above set forth, were, at the time of the issuance thereof, attached to the aforesaid designated bonds, as follows, to wit, to each of said bonds were attached six (6) of said interest coupons, numbered respectively 35-40, inclusive; to each of said bonds Nos. 77, 78, 234, 665, 666, 667, 798, 894, 895, 896 and 989 were attached fourteen (14) of said interest coupons, numbered respectively 21-34, inclusive; to each of said bonds Nos. 77, 78, 894, 895, 896 and 989 were attached nine (9) of said interest coupons, numbered respectively 12-20, inclusive; to each of said bonds Nos. 894, 895, 896 and 989 were attached two (2) of said interest coupons, numbered respectively 10 and 11; to each of said bonds Nos. 234, 665, 666, 667 and 798 were

attached one of said interest coupons, numbered 9; to each of said bonds Nos. 665, 666 and 667 were attached one of said interest coupons numbered 8.

#### VII.

That there were attached to each of the aforesaid bonds, at the time of their issuance, certain installment coupons, each [46] of which was of the same tenor and effect, and made and executed in the same form and manner as the installment coupon specifically described in this complaint as above set forth, differing only in the numbers thereof, the amount of money promised to be paid therein and date of maturity; that of said installment coupons, all those hereinafter specifically described, were, by the terms thereof, payable prior to the commencement of this action; that 253 of said installment coupons, in addition to the installment coupon specifically described in this complaint as above set forth, were, at the time of the issuance thereof, attached to the aforesaid designated bonds as follows, to wit, to each of said bonds were attached three (3) of said installment coupons, numbered respectively 8, 9 and 10; to each of said bonds Nos. 77, 78, 234, 665, 666, 667, 798, 894, 895, 896 and 989 were attached seven (7) of said installment coupons numbered 1-7 respectively.

#### VIII.

That subsequent to the issuance of said bonds and coupons, and prior to the commencement of this action, this plaintiff, did, in good faith, and in the ordinary course of business and for value before the apparent maturity of the said bonds or coupons and without knowledge of their actual dishonor, pur-

chase the aforesaid 59 bonds and the aforesaid 578 interest coupons and the aforesaid 254 installment coupons, in addition to the bonds and coupons hereinbefore specifically set forth in the first and second counts of this complaint, and ever since has been and now is the owner and holder of all of said bonds and coupons.

### IX.

Plaintiff further avers that on or after the several respective days and times when said coupons matured and became due and payable, each of them were presented to the Treasurer of said Rialto Irrigation District for payment, and demanded payment thereof; [47] each and all of said demands were then and there by said Treasurer refused.

### X.

That said bonds and coupons have not been paid, nor has any part of any one of said bonds or coupons been paid; that there is now due, owing and unpaid on said 578 interest coupons the sum of \$4,508.70, with interest thereon at the rate of seven per cent (7%) per annum from the date when each of said interest coupons respectively fell due, and there is now due, owing and unpaid on said 254 installment coupons the sum of \$16,060.00, with interest thereon at the rate of seven per cent (7%) per annum from the date when each of said installment coupons respectively fell due.

### XI.

That said defendant did not provide any funds for the payment of any of said above mentioned interest or installment coupons and had no funds with which



to pay the same, either at the time that they became due or at any time thereafter.

WHEREFORE, Plaintiff prays judgment against said defendant in the sum of FIFTY THOUSAND FIVE HUNDRED SEVENTY-SEVEN and 70/100 DOLLARS (\$50,577.70), together with interest as aforesaid, and costs of suit.

BURT CHELLIS,

Attorney for Plaintiff. [48]

State of California,

County of Los Angeles,—ss.

N. W. Stowell, being first duly sworn, deposes and says: That he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except matters and things therein stated on information and belief, and as to those matters, he believes it to be true.

N. W. STOWELL.

Subscribed and sworn to this 5th day of July, A. D. 1912, before me:

[Seal]

W. E. STOWELL,

Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: C. C. No. 1419. In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, a Corporation, Defendant. Supplemental Complaint. Filed Jul. 5, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Burt Chellis, Atty. for Plff., 901 Higgins Bldg., Los Angeles, Cal., F6521 or Main 2661. [49]

*In the District Court of the United States for the  
Southern District of California, Southern Divi-  
sion.*

C. C. No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

**Findings.**

This cause having been regularly tried and submitted to the Court, and the Court having considered and being now fully advised in the premises, finds the issues for the plaintiff and directs that a judgment be entered for the plaintiff for the sum of Fifty Thousand Five Hundred Seventy-seven and 70/100 (\$50,577.70) Dollars.

OLIN WELLBORN,

Judge of the District Court.

Dated 4th of October, 1913.

[Endorsed]: C. C. No. 1419. United States District Court, Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, Defendant. Findings. Dated — of October, 1913. Filed October 4, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk.

[50]

## UNITED STATES OF AMERICA.

*District Court of the United States, Southern District of California, Southern Division.*

C. C. No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

**Judgment.**

This cause having come on regularly on the 16th day of July, 1912, for hearing and trial before the Court without a jury, a trial by jury having been waived by the stipulation heretofore filed by respective parties; Burt Chellis, Esq., and J. W. Swanwick, Esq., appearing as counsel for plaintiff, and F. A. Leonard, Esq., appearing as counsel for defendant; and the trial having been proceeded with on said 16th day of July, 1912, and oral and documentary evidence having been introduced on behalf of the respective parties, and the evidence having been closed, and the cause, on said 16th day of July, 1912, submitted to the Court for its consideration and decision, and after due deliberation thereon, the Court having delivered its Findings and Decision in writing, which is filed, and ordered that Judgment be entered in accordance therewith;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court, that N. W. Stowell, plaintiff herein, have

and recover of and from the Rialto Irrigation District, the defendant herein, the sum of Fifty Thousand Five Hundred Seventy-seven and 70/100 (\$50,577.70) Dollars, together with his, said plaintiff's costs in this behalf taxed at \$

Judgment entered October 6th, A. D., 1913.

WM. M. VAN DYKE,

Clerk.

By C. E. Scott,

Deputy Clerk. [51]

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*In the District Court of the United States, Southern  
District of California, Southern Division.*

No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT, a Corporation,

Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED that on July 16th, 1912, the above-entitled cause came on for trial before the above court without a jury, a trial by jury being waived, Honorable Olin Wellborn presiding. The plaintiff appeared by Harris and Swanwick and Burt Chellis, his counsel, and the defendant by Henry Goodcell and F. A. Leonard, its counsel and the following proceedings were had:



**[Stipulation as to Certain Facts.]**

It was stipulated between the parties that at the time of the execution of the bonds sued upon in this action, A. B. Fowler was the President of the Board of Directors of the Rialto Irrigation District and signed said bonds as such president, and D. Robinson was the Secretary of said Board and signed said bonds and coupons as such secretary.

That the first delivery of bonds made by said District was made to the Semi-Tropic Land and Water Company, in December, 1890, being a delivery of three hundred bonds, and being bonds numbered one to three hundred inclusive; that the next delivery of bonds made by said District was made in May, 1892, or shortly thereafter, under the contract of date, May —, 1892, hereinafter set forth; that said District [52\*—1†] paid as they matured nearly all interest coupons maturing during the first four years after the date of said bonds;

That on or about the time, said District failed to have sufficient funds to pay said interest coupons as they became due, said District passed a resolution that it would pay interest on all overdue interest coupons from the time they became due until paid by said District; that the consideration that said District received for the bonds issued and which the bonds mentioned in this suit are a portion, was six hundred and fifty inches of water, pipe-lines,

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\*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Bill of Exceptions as Same appears in Certified Transcript of Record.

rights of way and other property and easements used in connection therewith, and that to-day, said property is of the value of not less than \$——; that on or about the first day of January, 1895, said District failed to have sufficient funds with which to pay said interest and installment coupons referred to in the complaint herein as they became due and that at no time since said date, has said District been in possession of sufficient funds with which to pay the same, or any part thereof, and no legal proceedings have been started by plaintiff or any other persons to compel or require said defendant to collect any funds for the purpose.

**Testimony of N. W. Stowell, for Plaintiff.**

N. W. STOWELL, a witness produced on behalf of the plaintiff, having been duly sworn, testified as follows:

I am the plaintiff in one of the three cases now on trial. At the time the action was brought, I resided at El Paso, Texas. These bonds which I now produce are the same ones sued upon in this action. Subsequent to the issuance of the bonds and coupons sued upon in this action and prior to the commencement of said suit, I acquired the same for value in [53—2] good faith in the ordinary course of business before the apparent maturity of said bonds and coupons and without knowledge of their actual dishonor or any defense thereto. I am acquainted with the property owned by the District. I value the water rights at \$925,000.00 for six hundred and fifty inches of water and the pipe-lines and pipe system at \$175,000.00. At one time, there was an as-

(Testimony of N. W. Stowell.)

signment of the contract from the Semi-Tropic Land and Water Company to me, of their contract with the District. The Semi-Tropic Land and Water Company's land and water rights were mortgaged and the company went into the hands of a receiver. It appeared that it had no funds to go on with the contract. It had conveyed to the District water which the District could not use on account of not having pipe-lines constructed. The District was very anxious to use the water. It was necessarily a failure for the people in the District if the water was not conveyed to them. Under those circumstances, to save my own neck and to save theirs, I had to carry out the Semi-Tropic Company's contract and connect the water with the lands so as to irrigate the lands. They had at that time some two hundred inches of water at the Ferguson Ranch, which it was impossible for them to use and under this contract, I piped that water from the Ferguson Ranch to another tract of water-bearing lands, which they had. By laying some six thousand or seven thousand feet of pipe, the water was conveyed from the Ferguson Ranch to what is known as the Lord Ranch; then by pressure pipe, it was delivered by water-wheel which with two hundred inches of water from the Ferguson Ranch, would raise practically two hundred more inches of water. That was then available through ditches to convey to the lands of the District through pipe-lines. The District [54—3] comprises some seventy-five hundred acres. The Superior Court in



(Testimony of N. W. Stowell.)

San Bernardino County, upon a petition from the receiver of the Semi-Tropic Company made an order, permitting the assignment of the contract to me and confirming such assignment.

Cross-examination.

The assignment referred to was accepted by me voluntarily, the order of Court which was obtained, confirming it. The values that I have placed upon the land and the water is my estimate of the present value. At the time the bonds were originally issued, there was delivered six hundred and fifty inches of running water. Afterward, the water stopped running entirely and had to be obtained by pumping. When I bid for the work for putting in the pipe-line system, the price was based on the bonds at ninety cents, or a cash consideration. Under the amended contract, the figures were raised so as to make the bonds par.

Mr. Hooper held the bonds for the district; I don't know in what capacity, but whatever bonds I got from him were delivered to me upon an order for the bonds. Some of the bonds were, I think, from the officers of the District. I took the orders to Mr. Hooper and he delivered the bonds to me. I received on July 3d, 1892, on an order from the Semi-Tropic Land and Water Company to Mr. Gardner, thirty-eight bonds, being numbered 951 to 988 inclusive. I received on August 3d, 1892, twenty-four bonds, being bonds numbered 926 to 949 inclusive. That is all that I received from Mr. Gardner. I received from Mr. Hooper \$24,000 in bonds and



(Testimony of N. W. Stowell.)

some that came under the old contract of the Stowell Cement Pipe Company, which I received from the Stowell Cement Pipe Company. I don't know what those were. I think those were received October 10th, 1894. I have no doubt [55—4] but what I received the bonds shown upon the various orders to which my receipt is attached. Defendant then offered the receipts in evidence, signed by N. W. Stowell, receipting for the following bonds, upon the following dates, to wit:

February 5th, 1895, for bonds from 426 to 451, both inclusive;

March 2d, 1895, for bonds from 452 to 460, both inclusive;

April 6th, 1895, for bonds from 461 to 464, both inclusive;

March 2d, 1897, for bonds from 465 to 473, both inclusive.

The following bonds were delivered to me by the Semi-Tropic Company, under my contract with it of date November 7th, 1890, upon the following dates, to wit:

January, 1891, bonds numbered 135 to 154; 205 to 234;

January 16th, 1891, bonds numbered 235 to 250;

September 16th, 1891; bonds numbered 251 to 260;

July 3d, 1892, bonds numbered 951 to 988;

August 31st, 1892, bonds numbered 939 to 949.

The following bonds were delivered to the Stowell Cement Pipe Company by the Semi-Tropic Company under its contract with the Pipe Company, of

(Testimony of N. W. Stowell.)

date June 4th, 1892, upon the following dates, to wit:

November 2d, 1892, bonds numbered 751 to 755; 901 to 906;

March 27th, 1893, bonds numbered 626 to 662;

July 1st, 1893, bonds numbered 401 to 410;

October 10th, 1894, bonds numbered 305 to 321; 325 to 350; 421 to 425; 476 to 492;

Bonds numbered 665 to 670, 907. [56—5]

The following bonds were delivered to me by the Rialto Irrigation District under my contract with it of date January 2d, 1895, for the construction of pipe-lines for it, upon the following dates:

February 5th, 1895, bonds numbered 426 to 451;

March 2d, 1895, bonds numbered 452 to 460;

April 6th, 1895, bonds numbered 461 to 464;

March 2d, 1897, bonds numbered 465 to 473.

The first bonds which I received came through the Semi-Tropic Company or from Mr. Gardner—were numbered less than 300. All bonds delivered before 1892 were numbered less than 300, and all delivered after that date were of a higher number. All of the bonds issued to the “Stowell Cement Pipe Company,” I purchased from it. I own forty per cent of the stock of that company.

#### Redirect Examination.

There are about seventy-eight hundred acres in the District, and when this pipe-line was first constructed, the land was desert land and was hardly worth fifteen dollars an acre. There is now over three thousand acres which is worth easily \$1,000 an acre, and the balance of the District is worth

\$200 to \$250 an acre, making an aggregate value of over \$4,000,000 in the District. [57—6]

**[Stipulation as to Certain Evidence, etc.]**

It was also stipulated that certain instruments offered and received in evidence in the trial of the case of Stowell vs. Rialto Irrigation District, in the Superior Court of San Bernardino County, as printed in the transcript on appeal to the Supreme Court of California and certain other instruments be deemed as offered and admitted in evidence, upon the trial of this action, including the testimony of certain witnesses, as shown in said transcript. Such instruments and testimony were thereupon offered in evidence and copies thereof are hereafter set forth and made a part of this Bill of Exceptions.

Plaintiff also offered in evidence all of the bonds and coupons mentioned and referred to in his amended complaint and supplemental complaint, which was received in evidence, said bonds and coupons being in the form set forth in said amended complaint and supplemental complaint and maturing as therein set forth. The coupons originally attached to said bonds had all been detached therefrom except the coupons sued upon in said action.

Plaintiff rests.

**[Testimony of Witnesses for Defendant Taken from Transcript of Evidence in Stowell vs. Rialto Irrigation District in Superior Court of San Bernardino County, Pursuant to Stipulation.]**

Pursuant to said stipulation, the following testimony was admitted from said transcript on behalf of defendant;

**[Testimony of J. W. Craig, for Defendant.]**

J. W. CRAIG, being called by defendant, testified as follows:

I was connected with the corporation known as the Semi-Tropic Land and Water Company, as a director at the time of the organization of the Rialto Irrigation District. The form of bonds was practically decided upon before the District election for the issuance of said bonds. I remember the making [58—11] of the conveyance by the Semi-Tropic Company to the District of the three hundred inches of water. The Semi-Tropic Company, received \$150,000 of the bonds for that deed, and the bonds were received by the company at the time the deed was delivered to the company.

The deed was offered in evidence and bears date December 22d, 1890; was acknowledged December 22d, 1890, and recorded at request of A. B. Fowler December 29th, 1890, in the Recorder's Office of San Bernardino County.

**[Testimony of D. Robinson, for Defendant.]**

D. ROBINSON, being called by defendant, testified as follows:

I was secretary of the District at the time of its organization and continued such until February, 1894. I remember the fact of the preparation and signing of the bonds of the District. To the best of my knowledge, they were signed December 21st, 1890. The deed for the three hundred inches of water was received by the District in exchange for the bonds. None of the bonds were ever adver-



(Testimony of J. E. Mack.)

tised for sale and none were ever sold while I was secretary.

**[Testimony of J. E. Mack, for Defendant.]**

J. E. MACK, being called by defendant, testified as follows:

I have resided for thirteen years in the District, and for a time was secretary of the Board and had a general knowledge of the affairs of the District from about 1893 down to the present time. About 1895, the Semi-Tropic Company went under and we made a supplemental contract with Stowell for the construction of the pipe-line, and after that the bonds were issued to Stowell direct. The bonds of the District were delivered to Mr. Stowell by order from the District to [59—12] Mr. W. S. Hooper. The bonds delivered to him under his contract were as follows:

On February 23d, 1895, bonds numbered	
426 to 451, amounting to.....	\$13,000.00
On March 19th, 1895, bonds numbered 452	
to 460, amounting to.....	4,500.00
On June 4th, 1895, bonds numbered 461 to	
464, amounting to.....	2,000.00
On April 10th, 1897, bonds numbered 465	
to 473, amounting to.....	4,500.00

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Total amount, \$24,000.00

**[Testimony of W. S. Hooper, for Defendant.]**

W. S. HOOPER, being called for defendant, testified as follows:

I am the Cashier of the San Bernardino National

(Testimony of W. S. Hooper.)

Bank and have been custodian of the 314 bonds of the District since June 15th, 1893. I have given out on orders, 136, and still have 178 on hand. These orders were issued by the Board certified to by the secretary and president.

**[Testimony of N. W. Stowell, for Defendant.]**

N. W. STOWELL, being called on behalf of defendant, testified as follows:

I remember in a general way the fact of the formation of the Rialto Irrigation District. Previous to that time I had been furnishing and laying pipe-line for the Semi-Tropic Land and Water Company.

Q. And after the formation of that district, did you make any arrangement or agreement with the company for continuing or constructing pipe-lines for the use of the district?

A. No, I had no other agreement.

Q. You constructed the pipe-lines that were constructed in the district, did you not?

A. Yes, sir. [60—13]

Q. And constructed them in part for the Semi-Tropic Company? A. Yes, sir.

Q. When was that arrangement made with the Semi-Tropic Company?

A. I think it was about 1886, the first contract; and then there was another one about 1888; and another one along in the fall of 1890.

Q. With reference to the work that was to be done for the district, about what time did you arrange with the company to do that work?

A. I think it was in the fall of 1890.

(Testimony of N. W. Stowell.)

Q. And that was to cover the lands where the district is?

A. I think the district was not formed at that time.

Q. You had the arrangement with the company before the district was formed?

A. That is my impression.

Q. What was your agreement with the company as to how you should be paid for that work?

A. It was cash, or optional to take some bonds at ninety cents, if I could sell the bonds—bonds of the irrigation district.

Q. At that time you knew in a general way, did you, that the company had some arrangement with the district by which it was to furnish water and pipe-lines for the district?

A. They said they were going to have the bonds; I knew nothing about what arrangements they had.

Q. Though you may not have known its terms, you understood that there was a contract of some kind between the company and the district?

A. Not at the time I made the contract.

Q. You did later, did you?

A. I knew afterward that they got these bonds for that Lord ranch or something that they sold up there—water.

Q. And you knew or understood in a general way that the company was to furnish water and also pipe-lines [61—14] for the district?

A. I knew they were going to pipe it.

Q. And that the company was to be paid for that

(Testimony of N. W. Stowell.)

in bonds of the district?

A. I didn't know anything about that; I didn't know how they got their pay. When I made the contract, they said they would have bonds enough to do the whole work, and would advance me the whole lot to do all the work at once, as soon as they got the bonds printed; and I took the contract on that understanding, and elected to take bonds instead of cash, because I sold the bonds before they were delivered for more than I took them for.

Q. You understood that the company was obtaining bonds from the district? A. Why, certainly.

Q. And that the company was under contract with the district in some way, to do the work for the district that you were doing for the company?

A. Well, I didn't contract to do particularly the district; it was a certain tract of land I was to cover, which included the district and lands north of the district. I didn't know where the district lines were.

Q. While you did not know the district lines, you did understand that the pipes that you were to lay included pipes for the district?

A. Yes, I knew it covered the district, whatever it was. They claimed to have bonds enough to pay me in advance for the doing of the whole work, and agreed to advance me the whole amount which I sold them if I did do, and as soon as they were printed I was to have enough to cover the whole amount of the work.

Q. In laying the pipe-lines in the district, in so



(Testimony of N. W. Stowell.)

far as they were in the district, you were doing that for the company?     A. Yes.

Q. And you understood in a general way that the company had some arrangement with the district by which [62—15] they were to do it for the district?

A. I knew they were going to do it; that is all I knew about it. I knew the company was going to do that work, because they contracted with me to do it. Some of it was in the Rialto district, and some in another district over there, and some was under the old settler's district. I didn't know one from the other.

Q. You understood that the company was to receive bonds from the district?

A. They were to pay me in bonds for doing it for the other two districts, as well as the Rialto district.

Q. You understood that the company was to receive bonds from the district on account of work which you did for the company?

A. They claimed they had the bonds, and were agreeing to advance them to me as soon as they were printed, and I waited till away in January. They didn't get them printed till January, ready for delivery, and so I didn't get them in advance the way they promised them to me.

Q. You understood that the company was to furnish water to the district?

A. I understood they had furnished water to the district; that is where they got the money *or* the bonds.

(Testimony of N. W. Stowell.)

Q. And that they were to see that water was piped for the use of the district?

A. Well, it was already piped down at the time, as far as the district.

Q. The pipes that you were to construct were not already constructed?      A. No.

Q. You mean the water was piped down to the district?      A. No.

Q. And not the distributing pipes?

A. Not all of them, some of them were in.

Q. I will call your attention to a paper that is pasted in the book that has been referred to here as the minute-book of the district, on page 53, a type-written paper, [63—16] dated "Los Angeles, Cal., November 16th, 1891," addressed to the directors of the Rialto Irrigation District, and purporting to be signed "Geo. H. Bonebrake, N. W. Stowell, Lowell L. Rogers," and ask you whether that is your signature to that paper?

A. Yes, sir; that is my signature; it is a petition to purchase the Ferguson place, as I understand.

Mr. GOODCELL.—I offer the paper in evidence. Said document is as follows: (As copied from said document pasted on page 53 of said minute-book.)

"Los Angeles, Cal., November 16th, 1891.

To the Directors of the Rialto Irrigation District.

Gentlemen:—The following facts are presented for your consideration, and based on them, a request is made, a compliance with which is considered just and advantageous to all parties.

First: Your bonds taken by the Semi-Tropic

(Testimony of N. W. Stowell.)

Land and Water Company and ultimately by others have proven to be for the present of less aid in carrying on immediate improvements than was expected, that is, they assist only as collateral and at only about one-third their value.

Second: This necessitates a use of a larger amount of the bonds than it was at first expected to push forward the work of sinking wells and laying pipe-lines.

Third: The parties who have invested their money in the enterprise of watering your district have thus far spent over \$250,000 over \$50,000 recently, and have as returns only got \$150,000 in your bonds, and these they can realize on only about one-third, or \$50,000.

Fourth: The pressure for still further extending the system is heavy, and the whole ought to be furnished at an early date, in order to meet the wants of improvements [64—17] and settlements.

It is further requested that you allow the issuance of \$50,000 more of the bonds of the Semi-Tropic Company under its contract with you, provided it turns over to the district by proper indentures the wells and pipe-lines completed and connected since the first transfer, and that deeds to the water on the Ferguson place and some fifty acres of the best artesian lands thereby placed in escrow as security that the full four hundred inches purchased will be delivered and the needed pipe-lines laid at an early date.

This it is believed will make the district fully

(Testimony of N. W. Stowell.)

secure and enable all parties to move forward with safety and dispatch.

Respectfully yours,

GEO. H. BONEBRAKE,  
N. W. STOWELL,  
LOWELL L. ROGERS."

I first learned of the contract referred to in this paper about 1895 or 1896. It might have been 1897; I don't know.

Well, I didn't know anything about what the contents of it was; I didn't even know what the Ferguson place was; I knew nothing about it; Governor Merrill brought it to me to sign it, and I told him I didn't know anything about it. Well, he said he was getting signatures, so I signed it to accommodate him; I didn't know anything about what it was or what it was about.

I didn't know the terms of the contract until about 1897. I first received Rialto Irrigation District bonds from the Semi-Tropic Company about January 10, 1891. I think there was about \$20,000 worth, par value. [65—18]

I received other bonds along after that, as I put the pipe in. I think the coupons sued on in this case are coupons that were cut from bonds that I received from the Semi-Tropic Land and Water Company. There may have been one or two that didn't come that way, but I think they all came from that company under those contracts.

I have a memorandum by which I can fix about the date when I first saw the contract, or became ac-



(Testimony of N. W. Stowell.)

quainted with the terms of the contract, between the company and the district. I have a copy that I sent to Mr. Robinson for, and in which he made and sent to me, a certified copy. It has a notary's certificate at the time it was copied, of date August 18, 1897, and my stamp on it, the date that I received it. That is about the date that I first saw the document.

Q. But you knew long before that that there was some kind of a contract between the company and the district?

A. Yes sir; for a year or two before that I knew there was a contract.

Q. At the time that you commenced the work of constructing the pipe-lines of the district you understood that there was some kind of a contract of the company with the district?

A. No, I didn't know anything about that. They claimed to have bonds enough to finish all the work, at the time that I took the work.

Q. But I understand you to say that at that time the bonds had not even been printed?

A. They had not been printed; they were entitled to them as soon as they were printed, and agreed to hand them to me I think some time in November.

Q. So that at the time that arrangement was made, you do not mean to say that they had actually received the bonds?

A. No, they had not been printed; but they were to be printed, and I was to get them some time in November, as I [66—19] understand it.

(Testimony of N. W. Stowell.)

Q. Then, you understood that the company had some agreement or arrangement with the district by which it was to get those bonds when they were printed?

A. Yes, sir, they were going to deed all that water system, and they were going to get bonds enough to do all the work; until they were printed they couldn't get them. Now, that is the long and short of it. And I sold the bonds.

The COURT.—You knew at that time that they were going to get bonds for doing the work there?

A. I knew they were going to get the bonds; I didn't know what they were going to get them for, except—

Q. What time was it you had that understanding, that was before you got the bonds, wasn't it?

A. I made the arrangement before that.

Q. Before you got the bonds, you knew what the Semi-Tropic Company were going to give in return for the bonds?

A. They were going to give the Rogers water system up there.

Q. And that other item you mentioned there of "work." You knew at that time that was a part of the consideration for the bonds?

A. I didn't know anything; only they said they would have bonds enough, as soon as they were printed, to pay me for doing all the work of the district.

Q. What work were they going to do?

A. They were going to pipe the Old Settler's

(Testimony of N. W. Stowell.)

tract, the Rialto District and the Citrus Belt District—three tracts of land.

Q. That is, the Semi-Tropic People were going to do that?

A. Yes, sir; they were selling land all over the country there; they had 30,000 acres.

Q. For that, or part of that work, they were going to get bonds of the Rialto Irrigation District—is that what [67—20] you mean?

A. I meant what I said.

Q. Well, did you mean that?

A. As soon as the bonds were printed they would have bonds enough to pay for all the work, and they were going to advance the whole amount of the work to begin with.

Q. Did you mean that? That the Semi-Tropic Company were to get the bonds in return for the work you mentioned there?

A. Oh, no; they were going to get the bonds for the pipe system delivered to them, and they would have bonds enough to pay me for doing all the work.

Q. You were going to do the work for them?

A. Yes, sir; for the Semi-Tropic Land and Water Company, and they were to pay me for it. I had been doing work for them right along. They had made some very extensive plans there, that took over \$100,000 of work contemplated.

Q. I understood you to say you had the bonds sold?

A. I had the bonds sold for 92½ cents, and the

(Testimony of N. W. Stowell.)

company failed to put up that agreed to take the bonds; so I have the bonds yet, some of them—I did have until a short time ago. I have got some of the coupons.

Q. When you wrote that letter with Mr. Bonebrake and Mr. Rogers to the company, do you mean to say that you had no acquaintanceship at all with the contract?

A. I had no acquaintanceship that there was a contract in existence; I signed it like any other petition that was put up to me, without ever knowing what it was for, or caring anything about it.

Q. That petition, as you call it, provided for the expenditure by you and Mr. Bonebrake of some more money, providing for the furnishing of these people some more water, in order that their plans might turn out better?

A. I don't know; I didn't understand what it was for. [68—21]

Q. You signed that petition without understanding what it meant?

A. Yes, sir; I knew nothing about what it was for; they came and asked me as a favor to sign it.

Q. Having taken \$150,000 worth of bonds, or \$250,000 whichever it was, and agreeing to do a large amount in addition, you mean to say you did not know what you were doing?

A. I had not at that time taken over—they had paid me probably thirty or forty thousand dollars in cash, and possibly I had twenty or thirty thousand dollars in bonds at that time; and they came



(Testimony of N. W. Stowell.)

and brought me a petition that they said would help out, and I should probably sign it as long as it didn't call for any expenditure on my part. I didn't call for any expenditure on my part. I didn't even know about the contract; I didn't even know where the Ferguson ranch was at that time.

Q. What reason was there for such action on your part?

A. Simply to accommodate Governor Merrill, that is all.

Q. How was Governor Merrill to be accommodated in that contract?

A. Well, he wanted it, and so I signed it.

Q. He does not appear in it; he is not mentioned in it; how was he to be benefited?

A. I don't think he was quite in touch with the people in that community, at that time, and consequently he did not sign it himself; he got Major Bonebrake, who was not known around that country—favorably known if known at all—to sign it; that is the way it looks to me now; I didn't know anything about it at the time.

Q. What was done with that petition?

A. I don't know; I never saw it till to-day.

Q. Nothing done by you under it?

A. No, sir. [69—22]

**[Documentary Evidence Offered in Stowell vs. Rialto Irrigation District in Superior Court of San Bernardino County and Incorporated Herein Pursuant to Stipulation.]**

The instruments above referred to as offered in evidence under said stipulation, are (omitting description) as follows:

**[Exhibit—Contract Dated December 10, 1890, Between Semi-Tropic Land and Water Company and Rialto Irrigation District.]**

1. Contract of date December 10th, 1890, between Semi-Tropic Land and Water Company with Rialto Irrigation District, duly acknowledged and thereafter recorded on December 28th, 1891.

“This agreement, made and entered into this tenth day of December, 1890, by and between the Semi-Tropic Land and Water Company, a private corporation of the County of San Bernardino, State of California, the party of the first part, and the Rialto Irrigation District, a public corporation, of the same county and state, the party of the second part, each of said corporations being hereunto duly authorized by resolutions of the board of directors of said corporations, respectively:

Witnesseth: That the said party of the first part, for and in consideration of the covenants and agreements on the part of said party of the second part, hereinafter contained, hereby promises and agrees to sell and convey unto the said party of the second part, by a good and sufficient deed in the form of grant, bargain and sale, free from incumbrance,

except as hereinafter provided, a continuous and perpetually flowing stream of water equal to one thousand (1,000) inches of water, measured under a four-inch pressure, flowing and derived from that certain tract of land, situated in the County of San Bernardino, State of California, and more particularly described as follows, to wit: (Here follows description.)

Party of the first part promises and agrees that said stream of water shall be gravity supply derived from artesian wells located upon the above-described tract of land, [70—23] or upon lands adjacent thereto, and that it shall be continuous stream flowing naturally and uninterruptedly;

Party of the first part promises and agrees that the pipe and pipe lines through which said water is to be conveyed and delivered to the said party of the second part, as therein provided, shall be, and consist of No. 14 double dipped and well riveted steel pipe, where the pressure will be 15 feet or more, and where the pressure will be from 8 to 15 feet, vitrified burned clay pipe, and where the pressure will be 8 feet or less well made cement pipe, mixed in proportions of at least 1 part of cement to 4 parts of sand and gravel, and that said pipe and pipe lines shall be laid and constructed in a good and workmanlike manner and so that the top thereof shall nowhere be less than eighteen inches below the surface of the ground; provided always, however, that said pipe and pipe lines shall at every point have sufficient strength to withstand the pressure required to carry the water therefrom to a height of

at least four feet above the highest point in the territory adjacent thereto and to be irrigated therefrom.

Party of the first part further promises and agrees that said pipe and pipe lines shall be laid along each avenue running north and south through the Rialto Irrigation District, as said avenues are delineated on the maps of the Semi-Tropic Land and Water Company's lands, or on and along the highest ridges between any two of said avenues, and also along the eastern and western boundary lines of said district, except along the township line between ranges 4 and 5, west San Bernardino base and meridian, and that each of said pipes and pipe lines shall at every point have a conveying capacity of at least seventy-five (75) inches. [71—24]

Party of the first part further agrees that said pipe lines shall be furnished with all necessary valves, water boxes, gates and turnouts, so located as to enable each and every farm lot in said Rialto Irrigation District, as said farm lots are delineated on the maps of the Semi-Tropic Land and Water Company's lands or other recognized survey or plat to be irrigated in the easiest manner possible from said water system and pipe line, as shall be determined by the directors of said district, each in his own division, respectively.

Party of the first part further promises and agrees to lay and construct said pipe-lines as soon and as fast as the same are required for the actual settlement or improvement of the lands within said Rialto Irrigation District, and that each and all of said



pipe lines and said pipe system shall be completed within two years from and after the date of this agreement.

Party of the first part further promises and agrees to have its main pipe laid and constructed from said source of water supply to the intersection of Acacia avenue with the north boundary line of said irrigation district, and to deliver to said party of the second part through said main pipe, and at said point of intersection, on or before the 15th day of December, 1890, a continuous, perpetually flowing stream of water equal to three hundred inches of water, measured as aforesaid.

And the party of the first part further promises and agrees that it will, as soon as said main pipes are laid and constructed, and said three hundred inches of water delivered, as aforesaid, to wit; on or before the 15th day of December, 1890, execute and deliver unto the said party of the second part, a good and sufficient deed of grant, bargain [72—25] and sale, conveying to said party of the second part, free from incumbrances, except as hereinbefore provided, said perpetually flowing stream of water equal to three hundred inches, measured and delivered as aforesaid, together with said main pipe line and the right of way and privileges belonging therewith or appertaining thereto, and also a perpetual right in and upon the tract of land constituting the source of supply of said water; together with the right to enter upon said tract of land, and to take such reasonable and proper measures thereon, as may be necessary to maintain the said stream of three hundred

inches of water, measured as aforesaid, up to the said amount, said water right and right of entry to be and remain a perpetual servitude in fee-simple upon said tract of land constituting the source of supply, as aforesaid, to the extent of the right so granted.

Party of the first part further promises and agrees to pursue with reasonable diligence the work of developing water by artesian wells, upon the above-described tract of land, or lands adjacent thereto, and of constructing said pipe lines and pipe system, as aforesaid, and to deliver said water to the said party of the second part as soon and as fast as may be required for the actual settlement and improvement of the lands within said Rialto Irrigation District.

Party of the first part further promises and agrees to have all of said pipe lines fully completed, and to develop and deliver as herein provided, said entire stream of water, derived and measured as aforesaid, in compliance with each and all of the terms of this agreement, on or before two years from and after the date of this agreement.

Party of the first part further promises and agrees that upon the subsequent delivery of each and every respective, continuous, perpetually flowing stream of water equal to one [73—26] hundred inches of water, measured as aforesaid, over and above the said stream of three hundred inches of water, measured as aforesaid, and up to and including the total amount of nine hundred inches of water of the full amount herein agreed to be conveyed, the said party

of the first part will execute and deliver unto the said party of the second part, a good and sufficient deed of grant, bargain and sale, conveying to the said party of the second part, free from incumbrances, except as hereinbefore provided, each said continuous, perpetually flowing stream of water equal to one hundred inches of said water, measured and delivered as aforesaid respectively, together with any and all pipe lines and pipe then laid and constructed, as herein provided, and the right of way and privileges belonging therewith, or appertaining thereto, and also a perpetual right in and upon the tract of land constituting the source of supply of each said stream of water, equal to one hundred inches of water, measured as aforesaid respectively, conveyed as aforesaid, together with the right of entry upon said tract of land, and to take such reasonable and proper measures thereon as may be necessary to maintain each respective stream of one hundred inches of water, measured and conveyed as aforesaid, up to the said amount of one hundred inches, over and above all previous conveyances of water derived from the same source, said water right and right of entry to be and remain a perpetual servitude in fee-simple upon said tract of land constituting the source of supply of said water so conveyed by each of said respective deeds, to the extent of the rights so and therein granted respectively.

Party of the first part further promises and agrees that upon the completion and acceptance of each and all of the said pipe lines, and of the whole



pipe system herein provided for, and the delivery, as herein provided, of the [74—27] whole, continuous, perpetually flowing stream of water equal to 1000 inches of water, measured and derived as aforesaid, the party of the first part will execute and deliver unto the said party of the second part, a good and sufficient deed of grant, bargain and sale, conveying unto the said party of the second part, free from incumbrance, except as hereinbefore provided, an estate in fee-simple in, of and to all and singular the source and sources of supply of said water, or any part thereof, all water up to the said amount of 1000 inches, not previously conveyed, and all pipe, pipe lines, rights of way and privileges belonging therewith or appertaining thereof, as hereinbefore provided.

For and in consideration of the covenants and agreements on the part of the party of the first part, hereinbefore contained, the party of the second part promises and agrees to buy and take, as hereinbefore provided, the said continuous, perpetually flowing stream of water equal to 1000 inches of water measured under a four-inch pressure, flowing and derived from the tract of land hereinbefore described, or from lands adjacent thereto, together with the lands from which said water is derived, and the pipe and pipe lines, rights of way and privileges used to convey and deliver said water, as hereinbefore provided, and to deliver to the said party of the first part therefor, bonds of the Rialto Irrigation District, the said party of the second part, to the amount of five hundred thousand dollars



(\$500,000.00), at par value, said bonds to be delivered as follows, to wit:

One hundred and fifty thousand dollars (\$150,000.00) of said bonds, at par value, to be delivered upon the construction and completion of the main pipe line hereinbefore provided for, to the intersection of Acacia avenue with the [75—28] north boundary line of said Rialto Irrigation District, and the delivery at said intersection of said continuous, perpetually flowing stream of water equal to three hundred inches, measured as aforesaid, and the delivery of the deed thereof, as hereinbefore provided, on or before the 15th day of December, 1890.

Party of the second part further agrees that it will deliver to the party of the first part fifty thousand dollars (\$50,000.00) of said bonds, at par value, additional, upon the delivery of each subsequent, perpetually flowing stream of water equal to one hundred inches, measured as aforesaid, respectively, and the delivery of the deed thereof, as hereinbefore provided, up to and including nine hundred inches of water, measured as aforesaid.

Subject, however, to the proviso that the last fifty thousand dollars (\$50,000.00) of said bonds, at par value, shall be retained until sixty days subsequent to the completion and acceptance of all of the pipe lines, and of the whole pipe system hereinbefore provided for, and the delivery, as herein provided, of the whole, continuous, perpetually flowing stream of water equal to 1,000 inches of water, measured and derived as aforesaid, and the delivery of the last deed, hereinbefore provided for, when the said fifty

thousand dollars (\$50,000.00) of said bonds, at par value, shall be delivered.

It is expressly agreed by and between the parties hereto, that all questions arising between them as to the sufficiency of said pipe lines, or any of them, or the measurement of any or all of said water shall be submitted to a board of arbitration, consisting of three competent engineers skilled in the determination of such matters, one of said engineers to be named by the party of the first [76—29] part, another by the party of the second part, and the third by the two engineers so chosen, the determinations of said board to be final and conclusive.

It is also expressly understood and agreed by and between the parties hereto, that so far as is practicable and consistent with the best interests of the said party of the first part, all work in or about the development of said water, and laying and construction of said pipe line, shall be given to persons residing within said Rialto Irrigation District, at regular wages.

It is expressly understood that the said party of the first part shall and will purchase and include in the 1000 inches of water, hereinbefore provided, to be conveyed to the said party of the second part, all private water and water rights owned or held within said irrigation district, and derived from the same or similar sources.

It is expressly understood and agreed that the deed to the first three hundred inches of water, hereinbefore provided for, to be delivered on or before the 15th day of December, 1890, shall be accom-

panied by good and sufficient releases executed by the South Rialto Land and Water Company and corporation, and L. L. Rogers, releasing any and all claims, rights and interests of either or both of them to or upon the said water and source of supply.

It is expressly understood and agreed that the said party of the first part is, at the time of delivery of each deed hereinbefore provided for, to furnish a good and sufficient abstract of title showing the property in each such deed described and conveyed to be free from incumbrance except as hereinbefore provided.

It is understood and agreed that each and all of [77—30] the promises, covenants and stipulations aforesaid, are to apply to and bind the successors and assigns of the respective parties hereto.

In witness whereof, the said parties have caused these presents to be executed, and their respective corporate seals hereunto affixed, the day and year first above written in duplicate.

SEMI-TROPIC LAND & WATER CO.,

[Seal]

By SAM'L MERRILL,

President, and

JOSEPH L. MERRILL,

Secretary.

RIALTO IRRIGATION DISTRICT,

[Seal]

A. B. FOWLER,

President.

DEVILLO ROBINSON,

Secretary."

**[Exhibit—Contract Dated December 22, 1890,  
Between Semi-Tropic Land and Water Com-  
pany and Rialto Irrigation District.]**

2. Contract of date December 22d, 1890, between Semi-Tropic Land and Water Company, with Rialto Irrigation District, duly acknowledged and thereafter recorded on December 28th, 1891.

“This indenture, made this 22d day of December, 1890, by and between Semi-Tropic Land and Water Company, a private corporation, having its principal place of business at Rialto, San Bernardino county, California, party of the first part, and Rialto Irrigation District, a public corporation of the same county and State, party of the second part, each of which corporations being hereunto duly authorized by resolution of its board of directors; witnesseth:

That that certain agreement bearing date the 10th day of December, 1890, by and between Semi-Tropic Land and Water Company, party of the first part, and Rialto Irrigation District, party of the second part, is hereby further modified by striking therefrom, and annulling the following clause, to wit:  
**[78—31]**

‘It is expressly agreed by and between the parties hereto that all questions arising between them as to the sufficiency of said pipe lines, or any of them or the measurement or all of said water shall be submitted to a board of arbitration, consisting of three competent engineers, skilled in the determination of such matters, one of said engineers to be named by the party of the first part, another by the party



of the second part, and the third by the two engineers so chosen; the determination of said board to be final and conclusive.'

And the parties hereto do further covenant and agree as follows, to wit:—

It is expressly agreed by and between the parties hereto that all questions arising between them as to the sufficiency of said pipe lines, or any of them or the measurement of any or all of said waters, shall be submitted to W. P. Gardiner, and shall be determined by him provided, however, that said Gardiner shall have power, if he so elect, to employ one or more competent engineers, skilled in the determination of such matters, to make proper examinations and render any services and furnish any information said Gardiner may desire, either in determination of the questions to be by him determined, under the provisions hereof, or under the provisions of said agreement of December 10th, 1890, or under any modifications thereof.

And the parties hereto do further covenant and agree as follows, to wit: That upon the execution of this agreement said Semi-Tropic Land and Water Company will forthwith execute and deliver to said Rialto Irrigation District the deed of grant, bargain and sale, mentioned in said agreement of December 10th, conveying to said Rialto Irrigation District [79—32] said perpetually flowing stream of water, equal to three hundred inches, together with the main pipe line and right of way and privileges belonging therewith or appertaining thereto, together with the perpetual right in and upon the tract of

land constituting the source of the said water supply, and to take such reasonable and proper measures thereon as may be necessary to maintain the said stream of three hundred inches of water, and at the same time with the delivery of said deed, to wit, forthwith upon the execution of this agreement, said Rialto Irrigation District shall deliver to said Semi-Tropic Land and Water Company the one hundred and fifty thousand dollars of bonds, at par value, provided in said agreement of December 10th, 1890, to be delivered upon the construction and completion of the main pipe line designated in said agreement, to the intersection of Acacia avenue with the north boundary line of said Rialto Irrigation District, and the delivery at said intersection of said continuous perpetually flowing stream of water, equal to three hundred inches measured as aforesaid, and the delivery of the deed thereof.

And said Rialto Irrigation District doth hereby further covenant and agree that upon the delivery to it of said deed, as last aforesaid, and upon the delivery by it of said one hundred and fifty thousand dollars in bonds, to said Semi-Tropic Land and Water Company, as aforesaid, to wit: immediately upon the execution of this agreement, said Rialto Irrigation District shall forthwith place in escrow in the hands of W. P. Gardiner, all the remaining three hundred and fifty thousand dollars of said five hundred thousand dollars of bonds, mentioned in said agreement of December 10th, 1890, which said three hundred and fifty thousand dollars of bonds shall be held by said Gardiner for delivery [80—33]

to said Semi-Tropic Land and Water Company at the times and upon the conditions and in the amounts provided for in said agreement of December 10th, 1890, and the modifications thereof, hereinbefore referred to, and the modifications thereof hereby made.

And the parties hereto do hereby further covenant and agree that the said Gardiner shall be, and he is hereby given full power upon behalf of the respective corporations, parties hereto, to absolutely determine whether the conditions of said agreement of December 10th, 1890, and the aforesaid modifications thereof, shall have been kept and performed from time to time by said Semi-Tropic Land and Water Company, so as to entitle it to receive the respective installments of said bonds and said W. P. Gardiner shall have full power to decide all questions that may arise under said agreement of December 10th, 1890, or under any of the modifications thereof between the parties hereto. And in case the said Gardiner shall, under the provisions hereof decide that the conditions aforesaid, as to the delivery of any installment of said bonds, have been complied with by said Semi-Tropic Land and Water Company, he shall forthwith deliver the same to said Semi-Tropic Land and Water Company, provided that said Semi-Tropic Land and Water Company shall, at the time of the delivery of any and every installment of said bonds to it, thereupon deliver to said W. P. Gardiner, for said Rialto Irrigation District, the abstract and deed of conveyance provided in said agreement of December 10th, 1890, to be delivered



to said Rialto Irrigation District upon the receipt of the respective installments of bonds at that time delivered, and provided also that said Semi-Tropic Land and Water Company, shall at or before that time, have done and performed on its [81—34] part all the conditions of said agreement of December 10th, 1890, so as to entitle it to have the respective installments of said bonds delivered to it.

The parties hereto do further covenant and agree hereby that before the delivery of any installment of said bonds by said W. P. Gardiner to said Semi-Tropic Land and Water Company he shall cancel on the bonds so to be delivered, all the coupons thereof for the accrued interest on the bonds so to be delivered up to date of the delivery of the bonds, provided, however, that if such delivery be made at intermediate periods between the dates of maturity of the coupons, he shall equalize the amount by cancelling such a number of the coupons earliest maturing as will aggregate in amount the sum equal to the accrued interest upon the bonds being delivered, to the date of delivery.

The parties hereto do hereby further covenant and agree to and with each other, and with said W. P. Gardiner, that the parties of the first part hereto shall pay to said W. P. Gardiner (each party hereto to pay one-half) when demanded from time to time, as services are rendered and as disbursements are required to be made by him, as reasonable compensation for any and all services rendered or to be rendered by him hereunder or in connection with the matters herein designated, either as attorney at law,



trustee, escrow holder, or otherwise, including the reasonable compensation of any engineers that may be employed by said W. P. Gardiner, together with all expenses and disbursements that may be properly incurred or made by said W. P. Gardiner.

Said W. P. Gardiner, as an attorney at law, shall examine each and every abstract of title, and examine each continuation of such abstracts, and shall pass upon the same, and be the sole judge as to whether each and every of such [82—35] abstracts or continuations thereof shall show that the property to be conveyed by the respective deeds, shall be free from incumbrance as provided for in said agreement of December 10th, 1890, and said W. P. Gardiner shall be the sole arbitrator of any and all questions of dispute that may arise between the parties hereto hereunder under said agreement of December 10th, 1890, or under any of the modifications thereof.

Said agreement of December 10th, 1890, modified as aforesaid, is hereby ratified and affirmed, and the same, and all the aforesaid modifications thereof, are hereto attached and as modified are hereby made part of this agreement, and when so attached hereto, a copy of the whole thereof, certified to be such copy, by the respective secretaries of the corporations parties hereto, shall be delivered to said W. P. Gardiner by said secretaries, and such copy shall constitute an authorization to said W. P. Gardiner to do and perform all things herein designated to be done or performed by him.

In witness whereof the respective parties hereto

have by resolutions of their respective boards of directors, caused these presents to be subscribed by their presidents and secretaries, and their respective corporate names and seals to be hereto affixed the 22nd day of December, 1890.

SEMI-TROPIC LAND & WATER CO.,

[Seal]

By SAM'L MERRILL,

President,

And by JOSEPH L. MERRILL,

Secretary.

RIALTO IRRIGATION DISTRICT.

[Seal]

By A. B. FOWLER,

President,

And by D. ROBINSON,

Secretary." [83—36]

[**Exhibit—Contract Dated May 26, 1892, Between  
Semi-Tropic Land and Water Company and  
Rialto Irrigation District.**]

3. Contract of date May 26th, 1892, between Semi-Tropic Land and Water Company with Rialto Irrigation District, duly acknowledged and thereafter recorded on June 3d, 1892.

“This agreement, Made this . . . . day of May, 1892, by and between the Semi-Tropic Land and Water Company, a private corporation, the party of the first part, and the Rialto Irrigation District, a public corporation, of the County of San Bernardino, State of California, the party of the second part, each of said corporations being hereunto duly authorized by resolution of the board of directors of said corporations respectively.

Witnesseth:—That the party of the first part

agrees to sell, transfer, or cause to be transferred and to deliver with deed of grant, bargain and sale to the party of the second part, and the party of the second part agrees to buy and receive at the time, in the manner and upon the terms hereinafter stated, certain water and water rights amounting to six hundred (600) inches of water, measured under a four (4) inch pressure derived from that certain tract of waterbearing lands situated in the County of San Bernardino, State of California, known as the Meeks Mill property (also known as the Raynor place), it being agreed that if it shall be found impossible to develop and procure said entire amount of said six hundred (600) inches of water from said Raynor place, then party of the first part may develop and procure a sufficient amount of water to make up said entire amount of said six hundred inches of water from adjacent lands; such supply of six hundred (600) inches of water measured as aforesaid, shall consist of a continuous and perpetually flowing stream of water, but the term "continuous" and "perpetually flowing" as used in this agreement shall not bind [84—37] the party of the first part to maintain a continuous flow of water after the fulfillment of the terms of this contract as to said six hundred inches of water in other particulars.

The party of the first part agrees to cause to be conveyed to the party of the second part the said water and water rights by the delivery of good and sufficient deeds of grant, bargain and sale, conveying to the party of the second part, the said water and water rights together with any and all pipe

lines, pipe or cement ditches then laid and constructed as provided herein, or as provided in the agreement hereinafter designated as "Exhibit A" and the rights, rights of way in and upon the tract of land constituting the source of said supply of water, viz., the said "Meek Mill property" with the right to take such reasonable and proper measures thereon as may be necessary to perpetually maintain the supply of water to be delivered as hereinbefore stated, said rights to be a perpetual servitude in fee simple in and upon the lands constituting the source of supply.

But it is understood that the party of the first part does not agree that such conveyances so far as the same includes the main pipe and ditch line now existing from the Raynor place to the point of delivery at the bluff or terrace hereinafter mentioned at its intersection with San Bernardino avenue shall pass to the party of the second part the title to said main pipe and ditch line nor the exclusive right to the use of the same; but such conveyance shall give to the party of the second part a proportionate right to the use of such main pipe and ditch line to the extent that may be necessary to convey the said six hundred inches of water.

It is further agreed that at the time of said conveyances to be made by grant, bargain and sale deed to the [85—38] party of the second part by the owners of said water right, the party of the first part shall execute and deliver to the party of the second part, quitclaim deeds to portions of said water and water rights equal to and incidental with



the property at such times respectively conveyed by said grant, bargain and sale deeds.

It is further agreed that the party of the second part accepts this agreement with notice of now outstanding encumbrances in said San Bernardino County against the said Meeks Mill property, such encumbrances existing by way of mortgage; and with notice of existing claims to water rights in said Meeks Mill property, estimated as amounting in the aggregate to one hundred and thirty-six inches of water measured as aforesaid, and that the obligations of the party of the first part under this, its agreement to procure grants of said six hundred inches of water do not imply a covenant to remove or cause to be removed such existing and known encumbrances, nor defeat, nor remove, nor cause to be removed or defeated said claims of prior rights in the water source and supply in and upon said Meeks Mill property except that the title to the water, water rights and servitudes shall be free and unencumbered except as to the prior claims of one hundred and thirty-six inches of water aforesaid.

It is further agreed by the parties hereto that whenever said conveyances of water and water rights shall be made by deeds as aforesaid and as hereinafter particularly provided and when the party of the first part shall have developed and delivered the said supply of six hundred inches of water together with the ditches and pipe lines hereinafter provided for the carrying of said supply of water, that the party of the second part shall accept the said conveyances [86—39] and delivery of water, water

rights, ditches and pipe lines as a full and final performance *pro tanto* of the obligations of the party of the first part under the said agreement designated as "Exhibit A" and under the supplementary agreement designated "Exhibit B," hereinafter mentioned; that is to say:

As a full performance to the extent of six hundred inches of water of the agreement to furnish one thousand (1,000) inches of water, as provided in said agreement, in exhibit "A" and exhibit "B."

It is further agreed that party of the second part shall have credit *pro tanto* upon the amount of bonds contracted in said exhibit "A" to be delivered to party of the first part (viz., five hundred thousand dollars in bonds at par) for all bonds hereby agreed to be delivered when said bonds are actually delivered.

It is further agreed that nothing in this contract shall be construed as a waiver of rights heretofore acquired by either party under said agreement exhibit "A."

The said six hundred inches of water shall be developed and delivered by the party of the first part to the party of the second part as follows:

Two hundred inches of water, measured as aforesaid, on or before sixty (60) days from the date of this agreement;

One hundred additional thereof on or before the 15th day of May, 1893;

Three further installments of one hundred inches each within two years from the date of this agreement provided, however, that none of said install-

ments of water of one hundred inches each shall be required to be furnished or accepted between the 1st day of December, and the 1st day of May, of any year. [87—40]

The deeds of conveyance of said water and water rights hereinbefore specified to be executed and delivered to the party of the second part shall be executed and delivered at the respective times of delivery of said installments of water as last above provided; the party of the first part agrees to furnish and deliver all of said six hundred inches of water in the mains of the party of the second part at the highest possible point (reference being had to the relative elevations of said Meeks Mill property and the lands within the boundary of said district) without cost or expense to said party of the second part except as herein expressly provided; and that the same shall be so furnished and delivered through a good and sufficient pipe line laid in conformity with the requirements of said agreement, exhibit "A," provided, however, that said party of the first part may at its option convey said water from said Meeks Mill property to a point at the intersection of San Bernardino Avenue and the edge of the bluff or terrace so called, through a good and sufficient covered cement ditch; but it is agreed that the wooden ditch now located in the place last mentioned may remain and be used during the remainder of the present irrigating season, but no longer. And it is agreed that in the event that said party of the first part shall elect to use such covered cement ditch from said Meeks Mill property to said point of intersection,



said cement ditch shall be covered in a good and workmanlike manner so as to preserve the water from impurities and that in that event suitable waterways for conveying supplies of storm water over said ditch without injury thereto shall be provided by said party of the first part.

It is further agreed that the pipe line or cement ditch and pipe line through which said stream of water is to be delivered as aforesaid from the said Meeks Mill property to [88—41] the mains of said party of the second part shall have an average fall of not to exceed ten feet to the mile.

The said party of the first part promises and agrees to lay and construct pipes, pipe lines, mains and laterals provided for in said agreement exhibit "A," in the manner and according to the specifications therein contained as fast as the same are required for the actual settlement or improvement of the lands within the said Rialto Irrigation District with all reasonable diligence; provided that the same shall be completed within eighteen months from the date of this agreement.

It is further understood and agreed that in as much as the waters derived from the Meeks Mill property will not be available for the irrigation of the whole of said Rialto Irrigation District, the board of directors of said irrigation district may require from the party of the first part and the party of the first part promises and agrees to deliver any further supply of water from the party of the first part to the party of the second part under the terms of said agreement, exhibit "A," over and above said six



hundred inches herein provided for and over and above any other waters that have been actually delivered prior to this date under the terms of said exhibit "A," or so much thereof as may be necessary at some point where the same may be made available for use on such higher lands through the present pipe line of said district.

Inasmuch as an alleged water right of seventy-two inches of water (known as the "rancheria" right) is included in the aforesaid prior claims of one hundred and thirty-six inches of water, and inasmuch as said water right is not in litigation, it is agreed that in case such alleged water right [89—42] is in whole or in part defeated, the priority thereof shall inure to the benefit of the party of the second part.

It is further understood and agreed upon the consideration of these presents and the matters herein contained and mentioned, the party of the second part agrees to pay for said property agreed to be delivered to it in the manner following, that is to say:

1st: Upon the presentation of full and complete releases upon the part of N. W. Stowell, and quitclaim deed from party of the first part, for all claims upon the pipe lines heretofore constructed to, in or for said Rialto Irrigation District by said Stowell under the terms of a certain contract between said Stowell and the party of the first part herein, in accordance with which contract the pipe lines heretofore laid and constructed to and in said district have been laid and constructed, the party of the second part will deliver to the party of the first part

bonds of the Rialto Irrigation District to the amount of twenty-five thousand dollars (\$25,000) par value, provided, however, that nothing in this paragraph contained shall be construed as a waiver of the right of the party of the second part to have said pipe lines that have been heretofore constructed duly tested and approved as provided in said original agreement, exhibit "A."

2nd: That when the party of the first part shall have delivered to the party of the second part, the said first installment of two hundred inches of water together with the deeds hereinbefore provided for, to be delivered at the time and in the manner aforesaid of the water rights accompanying said delivery of two hundred inches of water, the party of the second part will deliver to the party of the first part the bonds of the said party of the second part in said [90—43] agreement, exhibit "A" mentioned, to the amount of sixty-three thousand six hundred and sixty-two and 50-100 (\$63,662.50) dollars, par value.

3rd: That when the party of the first part shall have delivered to the party of the second part, either of said subsequent installments hereinabove mentioned of one hundred inches of water each, together with the deeds of conveyance hereinabove provided, of the water rights accompanying such installments of water so delivered and agreed to be delivered at the time and in the manner aforesaid, that the party of the second part will deliver to the party of the first part the bonds of the party of the second part, as in said agreement, exhibit "A" mentioned, to the amount of twenty-seven thousand five hundred dol-

lars (\$27,500.00) par value, for each of said installments of 100 inches.

4th: That upon the completion and acceptance of each successive installment of pipes, pipe lines, mains and laterals, in accordance to the terms of said agreement, exhibit "A," amounting to the sum of four thousand dollars (\$4000) in bonds payable to said N. W. Stowell for such installment according to the terms of the contract of said Stowell with the party of the first part herein, for such construction; the price at which said pipe is to be figured in any calculation to be not over the following prices per lineal foot, viz.: For eight inch pipe 25 cents; for ten inch pipe  $31 \frac{1}{3}$  cents; for twelve inch pipe  $42 \frac{2}{9}$  cents; for 16 inch pipe  $61 \frac{1}{9}$  cents; for 22 inch pipe  $91 \frac{1}{9}$  cents; for 24 inch pipe  $106 \frac{2}{3}$  cents; for 26 inch pipe  $121 \frac{1}{9}$  cents; for 30 inch pipe  $148 \frac{8}{9}$ . That then and thereupon the party of the second part shall deliver to the party of the first part to the amount of five thousand (5000) dollars in bonds for each such installment [91—44] of pipes, pipe lines, mains and laterals, until the whole of said pipe lines in said original agreement, exhibit "A," mentioned and provided for shall have been completed and paid for as aforesaid.

5th: That upon the completion and acceptance from the said point of delivery at the intersection of the bluff or terrace (so-called) with San Bernardino Avenue to the northern boundary of said Rialto Irrigation District of the main pipe line hereinbefore mentioned and to be laid for the conveyance of said stream of water equal to six hundred inches meas-



ured as aforesaid, that then and thereupon, the party of the second part shall deliver to the party of the first part an amount of bonds of said district at par sufficient to pay a sum equal to one hundred and twenty-five per cent of the cost price of said main pipe line between said points last mentioned at the rate provided for laying such main pipes and pipe lines in said Stowell contract mentioned and at the prices heretofore set out. It being understood that said 25 per cent in excess of one hundred per cent of such cost price is intended to be paid to the party of the first part as compensation for expenses incurred by the party of the first part in the construction of such mains and in excess of the amount so paid to Stowell.

The agreement hereinbefore called exhibit "A" is an agreement in writing bearing date the 10th day of December, 1890, by and between the parties aforesaid which agreement was on the 28th day of December, 1891, duly recorded in the office of the county recorder of said county of San Bernardino, in book 143 of deeds, at page 379 thereof; and the agreement hereinabove called exhibit "B" is an agreement in writing between the parties aforesaid bearing date the 22nd day of [92—45] December, 1890, being supplementary to said exhibit "A," and which exhibit "B" was on the 28th day of December, 1891, duly recorded in the office of the county recorder of said San Bernardino County, in Book 143 of Deeds, at page 269 thereof.

It is hereby expressly understood and agreed that the said agreement exhibit "A" and exhibit "B" are



hereby continued in full force and effect and free from any and all modifications, changes or amendments except in so far as the said agreement exhibit "A" construed together with said supplementary agreement exhibit "B," may be inconsistent with and specifically modified, changed or amended by these presents, and it is further understood and agreed that the time of complete fulfillment of said original agreement exhibit "A" as amended hereby and by said exhibit "B" is extended for the period of two years from December 10th, 1892, with respect to the obligation of the party of the first part to furnish the transfer and delivery of said entire 1000 inches of water and the water rights accompanying the same, as in these said agreements provided, but such extension of two years does not extend the limits of the time hereinbefore established for the completion of said pipe lines and ditches.

And it is further agreed that said extension of two years last above provided for shall become null and void if at the expiration of sixty days from the date hereof the party of the first part shall not have completed or shall not be proceeding with reasonable diligence to complete the work of developing and delivering of the installment of 200 inches of water hereinbefore mentioned.

It is further understood and agreed that within ten days from and after the date hereof, the party of the first part shall place in escrow with W. P. Gardiner of Los Angeles, California, a good and sufficient grant, bargain and sale deed [93—46] to the party of the second part of that certain tract of 300

acres of land known as the Ferguson ranch, located in said San Bernardino County, and being a part of a large body of lands of the party of the first part, more particularly described as follows: (Here follows description.)

The conditions of said escrow shall be as follows, viz.: That said deed may be delivered at any time to any person designated or the terms of the delivery hereinafter stated may be changed by mutual consent and direction of the parties hereto.

2nd. That said deed shall be held by said W. P. Gardiner in escrow as aforesaid until the expiration of two years from December 10th, 1892, unless sooner surrendered by mutual agreement by the parties hereto.

3rd. At the expiration of two years from December 10th, 1892, if the party of the first part shall have delivered to the party of the second part with proper deeds of conveyance as agreed the amount of water equal to 1000 inches measured as aforesaid, as by said agreement hereby amended, said water rights and waters are agreed to be delivered and conveyed; and shall have completed said pipe and cement ditch lines as likewise agreed to be completed within 18 months from the date hereof; then in that event the holder of the escrow shall deliver said grant deed to the party of the first part; and together therewith shall deliver to the party of the first part a quitclaim deed from the Rialto Irrigation District to the party of the first part, of the same premises, which quitclaim deed, the party of the second part agrees to place in escrow, for the purpose above stated, at the time

when said grant deed shall likewise be placed in escrow as aforesaid.

4th: If at the expiration of two years from December 10th, 1892, the party of the first part shall not have done and performed all its obligations then and in that event the [94—47] holder of the escrow shall deliver said deeds so held in escrow to the party of the second part.

In the event that the holder of the escrow, after the expiration of two years from December, 1892, shall deliver said grant deed to the party of the second part as hereinabove provided then, and in that event, such delivery shall take effect as of the date of said deed so delivered and in that event, it is further agreed that the party of the second part shall be entitled to the possession of said 300 acres of land immediately upon such delivery of said grant deed out of the escrow, and the party of the second part shall hold such premises so conveyed absolutely and in fee simple provided, however, that at any time after the two years and within three years from December 10th, 1892, the party of the first part shall be entitled to a reconveyance of said 300 acres so conveyed by tendering to the party of the second part, the amount in lawful money of any damages that may have been sustained by the party of the second part on account of any breach by the party of the first part of the provisions of the agreements secured by said escrow arrangements as hereinbefore recited.

In witness whereof, the said Semi-Tropic Land and Water Company, and the Rialto Irrigation District, the parties hereto, have by resolution of their

respective board of directors authorizing the same, caused this agreement to be executed in duplicate by their respective presidents and secretaries for and on behalf of said parties respectively in their corporate names and under their respective corporate seals the day and year first herein written.

SEMI-TROPIC LAND & WATER CO.,

[Seal]

By SAM'L MERRILL,

President, and

JOSEPH L. MERRILL,

Secretary. [95—48]

RIALTO IRRIGATION DISTRICT,

[Seal]

A. B. FOWLER,

President.

DEVILLO ROBINSON,

Secretary."

[Exhibit—Deed Dated December 22, 1890, from  
Semi-Tropic Land and Water Company to  
Rialto Irrigation District.]

4. Deed dated December 22d, 1890, from Semi-Tropic Land and Water Company to Rialto Irrigation District, duly acknowledged on December 23d, 1890, and duly recorded on December 29th, 1890, by A. B. Fowler.

Said deed conveys to said District 300 inches of water, together with certain pipe laid and constructed from the source of supply to the north boundary line of the District, and recites that the consideration is \$150,000.00, in bonds of the District and is made in pursuance of and in part performance



of the contract of December 10th, 1890, above set forth.

**[Exhibit—Deed Dated January 24, 1893, from P. A. Raynor and Wife to Rialto Irrigation District.]**

5. Deed dated January 24th, 1893, from P. A. Raynor and wife to Rialto Irrigation District, duly acknowledged and recorded on January 27th, 1893.

Said deed conveys to said District 55 inches of water and refers to the contract of May 26th, 1892, above set forth, and recites that P. A. Raynor agreed to prosecute certain developments for water, and to convey and deliver such water as developed, to the grantee for a consideration to be paid for by said District, and that in pursuance of said contract and for a consideration paid by said District according to the terms thereof, said deed is executed.

**[Exhibit—Deed Dated April 25, 1893, from P. A. Raynor and Wife to Rialto Irrigation District.]**

6. Deed dated April 25th, 1893, from P. A. Raynor and wife to Rialto Irrigation District, duly acknowledged and thereafter recorded on October 19th, 1893.

Said deed conveys to said District ninety-five inches of water and contains same recitals as deed between same parties of date January 24th, 1893, referred to above. [96—49]

**[Exhibit—Deed Dated June 2, 1893, from Semi-Tropic Land and Water Company to Rialto Irrigation District.]**

7. Deed dated June 2d, 1893, from Semi-Tropic Land and Water Company to Rialto Irrigation Dis-

trict, duly acknowledged and thereafter recorded on October 19th, 1893.

Said deed conveys to said District two hundred inches of water from the "Ferguson Ranch," described in contract between said Company and said District of date May 26th, 1896, above set forth.

**[Exhibit—Contract Dated November 7, 1890, Between N. W. Stowell and Semi-Tropic Land and Water Company.]**

8. Contract of date November 7th, 1890, between N. W. Stowell with the Semi-Tropic Land and Water Company.

Under said contract, Stowell agrees to furnish a good and serviceable pipe of cement concrete and lay the same in a good workmanlike manner in ditches to be constructed by the Semi-Tropic Land and Water Company, at prices stated to be paid as follows: "when made 60% of contract price, when laid 25% of contract price, and balance 15% when each mile is completed. Payment to be made in cash or in Rialto District bonds, at 90% face value, which bonds issued under the "Wright Act" on the land, are to be guaranteed legal and perfect by the Company.

**[Exhibit—Contract Dated June 4, 1892, Between Stowell Cement Pipe Company and Semi-Tropic Land and Water Company.]**

9. Contract of date June 4th, 1892, between Stowell Cement Pipe Company with Semi-Tropic Land and Water Company.

Under said contract, the Stowell Cement Pipe

Company agrees to furnish good cement concrete pipe and lay the same in ditches to be constructed by Semi-Tropic Land and Water Company, at prices stated, to be paid as follows: 60% of contract price when made and 40% when laid, in lots of \$4000.

The amount of pipe to be laid being amount that may be required to finish the piping of the Rialto Irrigation District. Payments to be made in bonds of District at par.

**[Exhibit—Contract Dated June 12, 1893, Between  
Rialto Irrigation District and Semi-Tropic Land  
and Water Company.]**

10. Contract of date June 12th, 1893, between Rialto Irrigation District with Semi-Tropic Land and Water Company. [97—50]

“THIS AGREEMENT, Made and entered into by and between the Semi-Tropic Land and Water Company, a corporation, organized and existing under the laws of the State of California, with its principal place of business at Rialto, California, party of the first part, and the Rialto Irrigation District, a public corporation organized in pursuance of an act of Legislature of the State of California, providing for the organization of Irrigation Districts, located in the County of San Bernardino, California, party of the second part;

WITNESSETH:—That whereas, there is now in existence and in force by and between said party, various contracts with amendments and supplements thereto and both parties deem it for the best interests of each, that a new contract be made and entered into, to cancel and supplant all previous contracts

between them, to wit, contract dated December 10th, 1890, with the modifications thereto of December 10th and December 22d, 1890, and the contract dated May 26th, 1892.

THEREFORE, said parties hereto do hereby agree to abrogate and cancel said previous contracts with modifications and amendments in so far as they remain unexecuted and that said party of the first part hereby agrees to sell water in the amounts and manner as hereinafter set forth and said second party agrees to buy the same. Said water to be measured under a four-inch pressure in the manner customary in measuring water. Same to be gravity supply and furnished from springs and natural streams and developed by means of artesian wells, tunnel work and open cuts from lands in San Bernardino County and in certain amounts from said lands as hereinafter mentioned, to wit: 301½ inches of water measured as aforesaid from those lands known as the "Meeks Mill" property in accordance with the contract with the Semi-Tropic Land and Water Company [98—51] and P. A. Raynor bearing date of May 26th, 1892, which contract is of record in the Recorder's office of San Bernardino County and to which reference is made hereby for the terms thereof and for a more particular description of said land and if said Raynor shall be unable to furnish the amount of water so agreed by him to be furnished, the party of the first part shall have the privilege of substituting other water from a source equally as high for any deficiency. Said water to be delivered in installments of not less than



twenty-five inches measured as aforesaid between the first day of May and the first day of December in any year and as part payment thereof, said party of the second part agrees to turn over and deliver to said first party bonds of the Rialto Irrigation District at par value, at the rate of \$275 per inch for each inch of water so delivered.

Said party of the first part further agrees to and does hereby convey and pledge to the party of the second part the following described property, to-wit:—

Farm lots 184 and the West 116.37 acres of farm lot 185 and 186 together with ten acres of land in what is known as the “Lord ranch” which property is more particularly described as follows, to wit:—

The Southeast ten acres of the tract known as the George Lord ranch commencing at the quarter section corner on the east side of Section 36, Township 1 North, Range 5 West, S. B. M.; thence West 11.15 chains; thence North 8.97 chains; thence East 11.15 chains; thence South 8.97 chains to the place of beginning, excepting nine inches of water from said last described tract of land, for the furnishing to the said party of the second part of  $348\frac{1}{2}$  inches of water. Said  $348\frac{1}{2}$  inches of water to include the three hundred inches [99—52] heretofore conveyed to said second party from said last described tract of land; the development for the  $348\frac{1}{2}$  inches of water shall be commenced at once and when the full amount of  $348\frac{1}{2}$  inches of water, including the amount now rising or flowing therefrom is developed thereon, said party of the second part agrees as

part payment thereof to turn over and deliver to the party of the first part, the sum of \$13,500 in bonds of the Rialto Irrigation District at par. The measurement thereof to be made between the first day of May and the first day of December, one hundred fifty inches of which water shall be delivered by June 1st, 1895, and the entire amount of 348½ inches to be delivered by June 1st, 1896. Hereby granting to said party of the second part the right of entry upon said land and to take such reasonable and proper measures thereon as may be necessary to develop and maintain the flow of such water as may be conveyed to said second party from said lands. Said water right of 348½ inches and the right of entry on said land to be and remain a perpetual servitude thereon and constitute a first lien in and upon said tract of land to the extent of the right so granted. Said party of the first part agrees to complete the laying of all lateral pipes and mains within the boundaries of said District according to the plat hereto attached as soon as may be or as rapidly as the necessities of the District may require, such laterals to be of sufficient capacity to irrigate such lands as are to be irrigated from the same and to be laid at least 18 inches under the ground. Such pipe to be cement pipe in the proportion of one part cement with four parts sand or gravel where it is subjected to not to exceed nine foot in pressure and between a nine foot pressure up to a fourteen foot pressure, vitrified pipe shall be used and where said pipes are subjected [100—53] to exceed a fourteen foot pressure, iron pipe shall be

used. That when said laterals and mains are completed, said second party agrees to pay to said first party, in part payment thereof, the sum of \$32,000 in bonds of the Rialto Irrigation District at par or said first party shall be entitled to receive a *pro rata* amount of said \$32,000 in proportion as the work is completed.

Said party of the first part further agrees to build a third lower main pipe line as shown on the map hereto attached commencing at about the center of the southern boundary line of farm lot 186 and running southwesterly as shown by a dotted line to about the southwesterly corner of lot 364 or if found practicable, the termination of said line shall in the discretion of said first party, be made at a higher altitude.

Said line to be laid as soon as practicable and in any event not later than June, 1895, and in consideration of One Dollar, paid to it by said party of the second part, the party of the first part hereby binds itself and agrees to and with the party of the second part that for and during the time to which the fulfillment of all the stipulations of this contract is limited, that said second party shall have the privilege and option to purchase of and from the party of the first part at the election of said second party, a perpetual right of way in said third pipe line for carrying capacity for 450 inches of water to the point where said pipe line crosses Pepper Avenue within the boundaries of said District, and a right of way in the balance of said pipe line sufficient to carry all the water necessary to irrigate



lands in said District lying South of said third line in proportion to the amount of water owned by the said District. In case said party of the second part elects to purchase said right of way [101—54] in said pipe line it shall be the sum of \$5,000 in cash to be paid on or before June 1st, 1896, with interest at six per cent per annum from the date of completion of said pipe line. Said \$500,000 bonded indebtedness of said District. If said party fails in the time mentioned to purchase said property, then this option to purchase said right of way shall terminate and be of no further force or effect and said first party shall retain said One Dollar as the price of this option. Said party of the second part does hereby grant to the party of the first part or its assigns, upon the completion of said third main, carrying capacity for water in the middle 30 inch main as shown on the map hereto attached for any amount of water over and above the amount necessary to irrigate lands in the District as the same is now composed, said reservation by said second party not to exceed the amount of 451½ inches of water, said second party reserving, however, the right to an additional carrying capacity in the event of their buying more than 1,000 inches of water, in which case they may increase their carrying capacity therein in such proportion to the amount of additional water purchased as the acreage to be irrigated from said line bear to the acreage in the District, and said party of the second part grants unto the party of the first part carrying capacity for water in the upper 30 inch main as shown on the map hereto attached



for any amount of water over and above the amount necessary to irrigate the District lands water from said line. Said reservation by said second party not to exceed the amount of 300 inches unless said second party shall purchase more than 1,000 inches of water in which case they may have additional carrying capacity in said line in such proportion to the amount of additional water purchased as the acreage to be irrigated from said line bears to the total acreage of the District. It being the [102—55] intention of the parties hereto to grant to the party of the first part such carrying capacity in said two pipe lines as may not be necessary for said second party to use to irrigate the lands at present contained within the boundaries of the Rialto Irrigation District. Said first party to be responsible for any damage to either of said lines resulting from the carelessness or excessive use thereof by said first party. Said first party to put in weirs for measuring water at the connection of all lateral pipes with the principal mains.

Said party of the first part further agrees that it will pipe the 200 inches of water heretofore deeded to said second party from the lands known as the Ferguson ranch to such a point of junction with the upper 30 inch main as said water can be carried on proper grade, such connection to be as near the junction of Eucalyptus Avenue and the upper 30 inch main as is practicable. Such pipe line to be completed on or before the first day of September, 1893, and if not completed by December 1st, 1893, said party of the first part shall forfeit to the party

of the second part the sum of \$10 per day for each day thereafter, that said line remains uncompleted. Upon the completion and fulfillment of the covenants and agreements herein mentioned by the party of the first part including the completion of the lower main, the delivery of the water according to the terms of the contract with P. A. Raynor and the delivery of the 348½ inches of water from what is known as the Lord place and lots 184 and the West half of 185 and the West half of 186 and the completion of the pile line from the Ferguson ranch to the upper 30 inch main and after the full amount of water has been delivered as aforesaid and the full flow thereof maintained for a period of sixty days from the measurement thereof, which [103—56] measurement shall be between the first day of May and the first day of December and conveyed to said second party by a proper deed of conveyance accompanied by an abstract or certificate of title showing the same to be free of encumbrance, then said second party agrees to turn over and deliver to said first party all of the remaining bonds of the \$500,000 issue of the Rialto Irrigation District. It is agreed by and between the parties hereto that all the remaining bonds of the Rialto Irrigation District shall be forthwith deposited with W. S. Hooper, Cashier of the San Bernardino National Bank, of San Bernardino, Cal. as trustee for the parties hereto, to be by him held in accordance with the terms of this agreement and turned over and delivered to the party of the first part as provided herein upon the order of the Board of Directors of the respective

parties hereto. If said party of the first part shall fail or neglect to keep any or all of the covenants herein agreed by said first party to do, then said second party may, by giving said first party 30 days' notice in writing of its intention so to do such work and perform such agreements as fully as said first party might or could do, such work to be done and agreements performed in a proper, economical and workmanlike manner and the expense thereof deducted from the amount of bonds which would otherwise be due and payable to said first party under the terms of this agreement hereby granting to the party of the second part the right to enter upon and develop water to the extent of 348½ inches from the lands hereinbefore described and to maintain the flow thereof granting to the party of the second part the right of way over and across any of the land of the party of the first part for any and all of the pipe lines hereinbefore mentioned and upon the completion and fulfillment by said second party of any such defaulted agreements the balance remaining of the [104—57] \$500,000 issue of bonds shall be turned over to the party of the first part after deducting the expense which said party of the second part may have reasonably incurred. It is further agreed by and between the parties hereto that all questions arising between them as to the sufficiency of the pipe lines herein mentioned or the measurement of the water herein referred to shall be submitted to a board of arbitration consisting of three competent engineers, one of whom to be named by the party of the first part, one by the party of the



second part and the third by the two so chosen, their determination of any such questions submitted to be final and conclusive and the expense of said board to be shared equally between the parties hereto.

IN WITNESS WHEREOF, the parties hereto have by resolution of their respective Board of Directors caused these presents to be subscribed by their proper officers and the respective corporate names and seals to be hereto affixed this 12th day of June, 1893.

SEMI-TROPIC LAND AND WATER  
COMPANY.

By WILLARD M. SHELDON,  
Vice-president.

And ANDREW P. WILSON,  
Secretary.

RIALTO IRRIGATION DISTRICT,

By C. A. KINGMAN,  
Prest.,

And DEVILLO ROBINSON,  
Sec."

[**Exhibit—Contract Dated January 2, 1895, Between  
N. W. Stowell and Rialto Irrigation District.**]

11. Contract of date January 2d, 1895, between N. W. Stowell with Rialto Irrigation District.

"THIS AGREEMENT, Made and entered into between N. W. Stowell, of Los Angeles, and the Rialto Irrigation District, a public corporation, organized in pursuance of an act of the Legislature of the State of California, located in San [105—58] Bernardino County, California, WITNESSETH:

THAT WHEREAS, there was entered into on the



12th day of June, 1893, an agreement between the Semi-Tropic Land and Water Company and the Rialto Irrigation District, and on the 22d day of March, 1894, the Superior Court of the County of San Bernardino appointed Willard M. Sheldon, Receiver of said Semi-Tropic Land and Water Company, and under instructions of an order, No. 17, of said Court of date October 25, 1894, said Sheldon as such receiver assigned and conveyed all interest of said Semi-Tropic Land and Water Company in said contract of date June 12th, 1894, so far as the same related to constructing pipe line in said District to N. W. Stowell;

AND WHEREAS, both parties hereto desire to modify and extend said contract for constructing said pipe lines;

NOW, THEREFORE, it is agreed between the parties hereto that said contract be, and the same is modified as follows, which shall from and after the date hereof, together with said contract be the contract for constructing the pipe lines of said district. Said N. W. Stowell agrees to furnish and lay a good and serviceable pipe of cement concrete and to excavate all trenches necessary, and backfill the same, covering the pipe to a depth of eighteen inches, and to furnish all gates and turnouts necessary, all to be of the same general style and quality as the work heretofore done in said District.

Said pipe to be made of one part good Portland cement by measure, and four parts sand and gravel.

The following are the estimated quantities and sizes required:—

10 inch pipe 27,020 feet	8 inch pipe 7800 feet.
14 inch pipe 6,800 feet	22 inch pipe 3838 feet.
20 inch pipe 3,550 feet	30 inch pipe 7310 feet.

Prices agreed upon are as follows: (Here follows prices.) [106—59]

The sizes of the pipe made may be modified as the District Engineer may elect, provided the whole cost does not exceed the total cost of the above estimate at prices agreed upon. The District to provide necessary and convenient rights of way for hauling and laying pipe.

THE RIALTO IRRIGATION DISTRICT agrees to pay for pipe in Bonds of said District at par as follows:

Upon each \$5000 worth of pipe when made at yard there shall be paid said Stowell \$3000 in Bonds at par. Thirty-five days after the completion of laying of each successive mile of pipe, the balance due upon such mile shall be paid.

Upon completion of a well 20 feet in diameter and 30 feet deep, to the satisfaction of the District Engineer, there shall be paid STOWELL the sum of \$2500 in Bonds.

Fifty per cent in value of the work to be done under this AGREEMENT shall be fully performed on or before March 1st, 1895.

Ninety per cent in value of the work to be performed on or before June 1st, 1895. The whole to be prosecuted diligently to completion.

The said STOWELL further agrees to furnish and lay 2240 feet of pressure pipe at the Lord Place for the sum of (\$2475.00) twenty-four hundred and

seventy-five dollars for 22 inch pipe of No. 14 iron; all payable in bonds at par, as work is completed. All earthwork and hauling from Rialto Station to ditch to be done by District.

IT IS UNDERSTOOD AND AGREED that all pipe heretofore furnished or constructed, or to be furnished or constructed for the Rialto Irrigation District or pipe system, and not heretofore deeded to said district, shall remain and be, the property of N. W. Stowell until the bonds received, or to be received therefore, shall have been paid, and upon completion [107—60] of the work herein agreed upon a deed of all the interests of said Stowell and the Stowell Cement Pipe Company to said pipe, and a deed from N. W. Stowell of a right of way for pipe lines, to said District, shall be executed and placed in escrow with W. S. Hooper, Cashier, San Bernardino National Bank, until conditions above are fulfilled.

IN WITNESS WHEREOF, the Board of Directors of said District by resolutions have caused these presents to be subscribed by its proper officers and the corporate name and seal to be hereunto affixed this 2d day of January, 1895.

(Seal of Corporation)

THE RIALTO IRRIGATION DISTRICT,

By DEVILLO ROBINSON,

President,

And JAMES E. MACK,

Secretary.

N. W. STOWELL."

**[Exhibit—Certified Copy Petition of Receiver of Semi-Tropic Land and Water Company, Filed October 6, 1894, in the Superior Court of San Bernardino County.]**

12. Certified copy of Petition of the Receiver of the Semi-Tropic Land and Water Company, filed on October 6th, 1894, in the Superior Court of San Bernardino County, which petition sets forth as exhibits thereto, the contract of date June 4th, 1892, between Stowell Cement Pipe Company with Semi-Tropic Land and Water Company, and contract of June 12th, 1893, between Rialto Irrigation District and Semi-Tropic Land and Water Company, above set forth, and being numbered above respectively 9 and 10. Said petition set forth the insolvency of the Semi-Tropic Land and Water Company, and its inability to complete its said contract of date June 12th, 1893, and the willingness of the Stowell Cement Pipe Company to complete said contract, upon an assignment thereof being made to said company, under an order of said court, and the willingness of both said District and said Stowell Cement Pipe Company to relieve said Semi-Tropic Land and Water Company from [108—61] all responsibility in relation to said contract, and for the delivery to said Stowell Cement Pipe Company of whatever bonds of said District might thereafter accrue under said contract.

Order of Court upon said petition, authorizing such assignment, and such assignment to Stowell Cement Pipe Company, pursuant to such order by the Receiver.



**[Exhibit—Judgment-roll in Special Proceedings  
Brought in the Superior Court of San Bernardino  
County.]**

13. The Judgment-roll in the Special Proceedings brought in the Superior Court of San Bernardino County, California, entitled “In the Matter of the Petition of the Board of Directors of the Rialto Irrigation District, praying that the proceedings for the issue and sale of the bonds of said District may be examined, approved and confirmed by Court.”

The petition, among other things, sets forth that the Board of Directors of the District estimated and determined the amount of money necessary to be raised for the purpose of constructing necessary irrigating canals and works and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of the acts of the Legislature relating to Irrigation Districts, and that the said Board estimated and determined such amount as \$500,000.00; that a special election was properly called at which there was submitted the question whether or not the bonds of said District should be issued in said amount; that notice thereof was properly given; that at such election, thirty-two votes were cast in favor thereof, and none against the same, and that thereafter, said Board ordered the bonds of said District to be issued in said sum; that on November 29th 1890, said Board accepted a proposition from the Semi-Tropic Land and Water Company for the exchange by said District of all of said bonds at par, for one thousand inches of

water to be [109—62] developed by artesian wells, and to be conveyed to lands in said District; the said Semi-Tropic Company also agreeing to convey to said District, the lands constituting the source of supply of said water, and all pipe, pipelines, rights of way and privileges used to convey, deliver and distribute said water; that the District was authorized to enter into the contract of December 10th, 1890, with said Semi-Tropic Company (said contract being hereinbefore set forth in No. — hereof) and briefly setting forth the terms of said contract; that these special proceedings were authorized on November 17th, 1890, by the Board of Directors of said District; that under the prayer of said petition, the Court was asked to examine, and determine the legality and validity of, and confirm, each and all of the proceedings for the organization of said District under the provisions of said Act, from and including the petition for the organization of said District, and all other proceedings which may affect the legality or validity of said bonds and the order for the sale and exchange thereof.”

Due and legal notice of the hearing of said petition was given as required by law.

Upon such hearing, a decree of Court was duly given, made and entered therein on January 8th, 1891, whereby it was, among other things, decreed that said petition was presented to said court on December 12th, 1890; that said District was duly and legally organized; that the Board of Directors of said District estimated and determined the amount of money necessary to be raised for the purpose of

constructing necessary irrigation canals and works and acquire necessary property therefor, which said Board estimated and determined [110—63] to be \$500,000.00; that a special election had been called, as set forth in the petition, and that notice had been properly given thereof, that such bonds had been authorized by such election, that said Board authorized the bonds to be issued in the sum of \$500,000.00; that the said Board had accepted the proposition from said Semi-Tropic Company, as set forth in said petition, for the exchange of bonds for water, etc.; that said contract of December 10th, 1890, referred to in said petition was duly entered into, that all of the allegations contained in the petition were true and correct; that all proceedings which might affect the legality or validity of said bonds, and the order for the exchange thereof, at par, as set forth in said contract, had been examined and determined by the Court, and that all of said proceedings were legal and valid, and confirmed. [111—64]

The said defendant, within the time allowed by law and rule of Court and as extended by order of Court, hereby proposes the foregoing Bill of Exceptions, containing all the proceedings had on the trial of said cause and asks that the same be settled and allowed, if correct.

HENRY GOODCELL,  
F. A. LEONARD,  
Attorneys for Defendant.

Due and timely service of a copy hereof is hereby admitted this 30 day of October, 1913.

BURT CHELLIS,

J. W. SWANWICK,

Attorneys for Plaintiff.

It is hereby stipulated that the foregoing Bill of Exceptions may be settled and made a part of the record herein.

Dated ———, 1913.

\_\_\_\_\_ ,

\_\_\_\_\_ ,

Attorneys for Plaintiff.

\_\_\_\_\_ ,

\_\_\_\_\_ ,

Attorneys for Defendant.

The foregoing Bill of Exceptions, duly proposed and agreed upon by counsel for the respective parties, is correct in all respects and is hereby approved, allowed and made a part of the record herein.

Dated this — day of ———, 1913.

\_\_\_\_\_ ,

Judge. [112]

[Endorsed]: Original. No. 1419. In the District Court of the United States, Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, a Corporation, Defendant. Proposed Bill of Exceptions. Filed Oct. 30, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Henry Goodcell and Leonard & Surr, Attorneys for ———, Old Postoffice Block, San Bernardino, California. [113]



**[Order Approving, etc., Bill of Exceptions.]**

*In the District Court of the United States, in and  
for the Southern District of California, South-  
ern Division.*

C. C. No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT, a Corpora-  
tion,

Defendant.

The attached Bill of Exceptions duly proposed is correct in all respects and is hereby approved, allowed and made a part of the record herein.

Dated this 9th day of December, 1913.

OLIN WELLBORN,

Judge.

[Endorsed]: C. C. No. 1419. United States District Court, Southern District of California, Southern Division. N. W. Stowell vs. Rialto Irrigation District. Engrossed Bill of Exceptions. Filed Dec. 9, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [114]

*In the District Court of the United States, Southern  
District of California, Southern Division.*

No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

**Petition [of Rialto Irrigation District] for Writ of  
Error.**

The above-named defendant, the Rialto Irrigation District, feeling itself aggrieved by the judgment entered on the 6th day of October, 1913, in the above-entitled cause, in favor of said plaintiff and against this defendant, comes now and files herewith an assignment of errors and respectfully petitions the above-named court for its allowance of a Writ of Error to review in the United States Circuit Court of Appeals for the Ninth Circuit, the said judgment, to the said District Court of the United States, Southern District of California, Southern Division, under and according to the laws of the United States, in that behalf made and provided and that a transcript of the records and proceedings and papers on which said judgment was made and entered, duly authenticated may be sent to the said Circuit Court of Appeals.

Wherefore, your petitioner prays that the said Writ of Error be issued for the correction of errors so complained of, and that a transcript of the records

and proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to said Circuit Court of Appeals, and that an order may be made fixing the amount of bond required for costs.

HENRY GOODCELL,  
F. A. LEONARD,  
Attorneys for Petitioner. [115]

[Endorsed]: No. 1419. In the United States District Court, Ninth Circuit, Southern District of California. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, Defendant. Petition for Writ of Error. Filed Mar. 17, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. Postoffice Block, San Bernardino, Cal. [116]

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*In the District Court of the United States for the  
Southern District of California, Southern Division.*

C. C. No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

**Assignment of Errors [of the Rialto Irrigation  
District].**

The defendant in this action, in connection with its petition for a writ or error herewith filed, makes the following assignment of errors, upon which it will rely upon its appeal from the judgment in this

action, and upon which it claims such judgment should be reversed, to wit:

1. The Court erred in overruling the defendant's demurrer to the amended complaint, for the reason that said amended complaint does not state facts sufficient to constitute a cause of action.

2. The Court erred in overruling said demurrer as to the first count of said complaint, for the reason that said first count does not state facts sufficient to constitute a cause of action.

3. The Court erred in overruling said demurrer as to the second count of said complaint, for the reason that said second count does not state facts sufficient to constitute a cause of action. [117]

4. The Court erred in rendering the judgment made and entered in this cause, for the reason that the amended complaint does not sustain said judgment, nor any part thereof.

5. The Court erred in rendering said judgment, for the reason that the supplemental complaint does not sustain said judgment, nor any part thereof.

6. The Court erred in rendering said Judgment, for the reason that no findings of fact were made or filed, and such findings were not waived.

7. The Court erred in rendering said judgment, for the reason that no proper or sufficient findings of fact were made or filed, and such findings were not waived.

8. The Court erred in rendering said judgment, for the reason that the facts found, expressly or by implication, are not sufficient to justify the conclusions based thereon or the said judgment, and par-



ticularly in the following respects:

(a) The facts so found show that none of the bonds alleged in the amended complaint or in the supplemental complaint bore date at the time of their issue, as required by the statute authorizing the issue of bonds by the defendant.

(b) Said facts show that none of said bonds ran, by their terms, for the length of time they were required to run by the provisions of said statute.

(c) Said facts show that none of said bonds were negotiable in form, as required by the provisions of said statute. [118]

(d) Said facts show that certain coupons alleged and sued upon in the amended complaint matured more than four years prior to the commencement of the action; and the alleged cause of action as to each and all of said coupons was barred by statute of limitations, as pleaded in the defendant's amended answer.

(e) Said facts show that certain coupons alleged and sued upon in the supplemental complaint matured more than four (4) years prior to the filing of said supplemental complaint; and the alleged cause of action as to each and all of said coupons was barred by statute of limitation, as pleaded in said amended answer (said answer and plea, by stipulation, being made to apply as an answer and plea to said supplemental complaint).

9. The Court erred in making its findings of fact, express or implied, for the reason that certain of such findings, necessary to sustain the conclusions and judgment of the Court, were not justified by the

evidence, and were without substantial support by any evidence, and particularly in the following respects:

(a) There was no evidence to justify or support the finding to the effect that said bonds or any of them bore date at the time of their issue.

(b) There was no evidence to justify or support the finding to the effect that said bonds, or any of them, ran by their terms, or ran in fact, for the term or period prescribed by statute. [119]

(c) There was no evidence to justify or support the finding to the effect that said bonds, or any of them, were negotiable in form, or in the form required by the statute under which they are alleged to have been issued.

(d) There was no evidence to justify, or support the finding to the effect that said bonds, or any of them, were issued or delivered for a lawful or valid consideration.

(e) There was no evidence to justify or support the finding to the effect that said bonds, each and all of them, were not issued or delivered for a consideration which, wholly or in great part, consisted in the doing of construction work for the defendant.

(f) There was no evidence to justify or support the finding to the effect that none of said bonds were issued or delivered for a consideration which, wholly or in great part, consisted in the doing of construction work for the defendant.

(g) There was no evidence to justify or support the finding to the effect that said bonds, or any of said bonds, were issued or delivered to any pur-

chaser or taker on November 17, 1890, or on January 1, 1891, or at the time of their actual date or their apparent date or their alleged date.

(h) There was no evidence to justify or support the finding to the effect that said bonds, or any of them, were ever lawfully issued, or were lawful obligations of the defendant. [120]

(i) There was no evidence to justify or support the finding to the effect that the board of directors of the defendant, on December 12, 1890, or at any time, brought an action in the Superior Court of San Bernardino County to determine the validity of said bonds, or any of them.

(j) There was no evidence to justify or support the finding to the effect that on January 3, 1891, or at any time, said Superior Court, by a judgment duly given and made in said action, or given or made at all, declared said bonds or any of them to be valid.

(k) There was no evidence to justify or support the finding to the effect that the plaintiff acquired or purchased said bonds or coupons, or any of them, in good faith and in the ordinary course of business, without knowledge or notice of their invalidity, or of any defense thereto.

(l) There was no evidence to justify or support the finding to the effect that the plaintiff did not acquire or purchase said bonds and coupons, or any of them, with notice or knowledge of each or any of the facts alleged in the defendant's amended answer to the amended complaint as grounds of their invalidity and as defenses thereto.

(m) There was no evidence to justify or support

the finding to the effect that none of the causes of action alleged in the amended complaint, as to any of the coupons therein sued upon, was barred, by statute of limitations, as pleaded in the defendant's amended answer. [121]

(n) There was no evidence to justify or support the finding to the effect that none of the causes of action alleged in the supplemental complaint, as to any of the coupons therein sued upon, was barred by statute of limitation, as pleaded in said amended answer.

10. The Court erred in rendering its said judgment, for the reason that the amount of said judgment is in excess of the aggregate amount of all coupons alleged and sued upon in the amended complaint and the supplemental complaint.

Upon the foregoing assignments of error, and upon the record in said cause, the said defendant prays that said judgment may be reversed.

Dated March 17th, 1914.

HENRY GOODCELL,

F. A. LEONARD,

Attorneys for Defendant (and Plaintiff in Error).

[Endorsed]: C. C. 1419. In the District Court of the United States for the Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, Defendant. Assignment of Errors. Filed Mar. 17, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [122]



*In the District Court of the United States, Southern  
District of California, Southern Division.*

No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

**Order Allowing Writ of Error [on Behalf of Rialto  
Irrigation District].**

On this 17th day of March, 1914, came the defendant in the above-entitled action, by its attorneys, and filed herein and presented to the court its petition praying for the allowance of a Writ of Error, intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises; on consideration whereof, the Court does allow the Writ of Error upon the defendant giving a bond in the sum of Three Hundred Dollars (\$300.00), which shall operate as a cost bond; and

IT IS FURTHER ORDERED that said petition be and the same is hereby allowed and granted and that the Writ of Error be allowed in said action, returnable before the United States Circuit Court of Appeals for the Ninth Circuit, on the 14th day of

April, 1914, and that a transcript of the record and all of the proceedings and papers on which the judgment was made and entered in this cause shall be made and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit. [123]

IT IS FURTHER ORDERED that the bond in the sum of Three Hundred Dollars, tendered by said defendant, be and the same is hereby approved as the bond for costs on the Writ of Error herein.

OLIN WELLBORN,

Judge.

[Endorsed]: No. 1419. In the United States District Court, Ninth Circuit, Southern District of California. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, Defendant. Order Allowing Writ of Error. Filed Mar. 17, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Postoffice Block, San Bernardino, Cal. [124]

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**[Bond on Writ of Error Sued Out by Rialto  
Irrigation District.]**

*In the District Court of the United States, Southern  
District of California, Southern Division.*

No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

## KNOWN ALL MEN BY THESE PRESENTS:

That we, Rialto Irrigation District, as principal and J. C. Boyd and W. E. Leonard, as sureties are held and firmly bound unto N. W. Stowell in the just and full sum of Three Hundred Dollars to be paid to said N. W. Stowell, his heirs, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of March, in the year of our Lord, 1914.

Whereas, lately at the July term, 1913, of the said District Court of the United States, Southern District of California, Southern Division, in a suit pending in said court, between N. W. Stowell, plaintiff, and Rialto Irrigation District, defendant, a judgment was rendered against said Rialto Irrigation District, defendant, and in favor of the plaintiff, and the said Rialto Irrigation District, defendant, in said action, has obtained from the United States Circuit Court of Appeals, a Writ of Error, to reverse the judgment in the aforesaid suit, and a citation directed to the said N. W. Stowell, citing and admonishing him to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit, to be holden [125] at San Francisco, California, not exceeding thirty days after the date of said citation. Now, the condition of the above obligation is such that if the said Rialto Irrigation District, the defendant in said action, plaintiff in error as aforesaid, shall prosecute its said Writ of Error to effect, and answer all costs which may be ad-

judged against it, if it fails to make good its plea, then this obligation to be void, otherwise, to remain in full force and effect.

RIALTO IRRIGATION DISTRICT.

By HENRY GOODCELL and

F. A. LEONARD,

Its Attorneys.

J. C. BOYD.

W. E. LEONARD. [126]

State of California,

County of San Bernardino,—ss.

J. C. Boyd and W. E. Leonard, the sureties named in the foregoing undertaking, being first duly sworn, each for himself, deposes and says: That he is a resident and freeholder within the State of California, and is worth the amount specified in said undertaking, as the penalty thereof, and property situated within said State of California, over and above all his just debts and liabilities, exclusive of property exempt from execution.

[Seal]

J. C. BOYD.

W. E. LEONARD.

Subscribed and sworn to before me this 17th day of March, 1914.

M. A. KERR,

Notary Public in and for the County of San Bernardino, State of California.

Approved March 17th, 1914.

OLIN WELLBORN,

Judge.

[Endorsed]: Original. No. 1419. In the United States District Court, Ninth Circuit, Southern Dis-



trict of California. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, Defendant. Bond for Costs. Filed Mar. 17, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Post-office Block, San Bernardino, Cal. [127]

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UNITED STATES OF AMERICA.

*District Court of the United States, Southern  
District of California.*

CLERK'S OFFICE.

No. 1419.

N. W. STOWELL

vs.

RIALTO IRRIGATION DISTRICT.

**Praeipie [of Rialto Irrigation District for  
Transcript of Record].**

To the Clerk of Said Court:

Sir: Please issue copies of the following papers for the record on appeal in the above-entitled action, to wit:

1. Amended complaint.
2. Demurrer to amended complaint.
3. Order overruling demurrer to amended complaint.
4. Amended answer to amended complaint.
5. Stipulation filed July 5th, 1912.
6. Supplemental complaint.
7. Findings.
8. Judgment.
9. Petition for writ of error.

10. Assignment of errors.
11. Order allowing writ of error.
12. Writ of error.
13. Citation on writ of error.
14. Bond.
15. Certificate of clerk.
16. Bill of exceptions.

HENRY GOODCELL and  
F. A. LEONARD,

Attorneys for Defendant and Plaintiff in Error.

[128]

[Endorsed]: No. 1419. U. S. District Court,  
Southern District of California, Southern Division.  
N. W. Stowell vs. Rialto Irrigation District.  
Praecipe for Transcript on Writ of Error. Filed  
Mar. 23, 1914. Wm. M. Van Dyke, Clerk. By  
Chas. N. Williams, Deputy Clerk. [128½]

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UNITED STATES OF AMERICA.

*District Court of the United States, Southern  
District of California.*

CLERK'S OFFICE.

No. 1419.

N. W. STOWELL

vs.

RIALTO IRRIGATION DISTRICT.

**Amended Praecipe [of Rialto Irrigation District for  
Transcript of Record].**

To the Clerk of Said Court:

Sir: Please issue: COPIES OF THE FOLLOW-

ING PAPERS for the record on appeal in the above-entitled action, to wit:

1. Complaint.
2. Demurrer to complaint.
3. Order *overruling complaint*.
4. Amended complaint.
5. Demurrer to amended complaint.
6. Order overruling demurrer to amended complaint.
7. Amended answer to amended complaint.
8. Stipulation filed July 5th, 1912.
9. Supplemental complaint.
10. Findings.
11. Judgment.
12. Petition for writ of error.
13. Assignment of errors.
14. Order allowing writ of error.
15. Writ of error.
16. Citation on writ of error.
17. Bond.
18. Certificate of clerk.
19. Bill of exceptions.

HENRY GOODCELL and  
F. A. LEONARD,

Attorneys for Defendant and Plaintiff in Error.

[129]

[Endorsed]: No. 1419. U. S. District Court, Southern District of California. N. W. Stowell vs. Rialto Irrigation District. Amended Praecipe for Transcript for Record on Appeal. Filed March 27, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [130]

**[Certificate of Clerk U. S. District Court to  
Transcript of Record on Writ of Error.]**

*In the District Court of the United States, in and  
for the Southern District of California, South-  
ern Division.*

C. C. No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

I. Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and thirty (130) typewritten pages, numbered from 1 to 130, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Complaint, Demurrer to Complaint, Order Sustaining Demurrer to Complaint, Amended Complaint, Demurrer to Amended Complaint, Order Overruling Demurrer to Amended Complaint, Amended Answer to Amended Complaint, Stipulation filed July 5, 1912, Supplemental Complaint, Findings, Judgment, Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Bond on Writ of Error and Amended Praecipe for Transcript, all in the above and therein entitled cause; and I do further certify that the foregoing constitutes the record in said cause as specified in the said Praecipe



for Transcript, filed in my office on behalf of the defendant and plaintiff in error by its attorneys of record.

I do further certify that the cost of the foregoing record is \$70.05, the amount whereof has been paid me by [131] the Rialto Irrigation District, the plaintiff in error in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 22d day of September, in the year of our Lord one thousand nine hundred and fourteen, and of our Independence the one hundred and thirty-ninth.

[Seal] WM. M. VAN DYKE,  
Clerk of the District Court of the United States of  
America, in and for the Southern District of  
California. [132]

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[Endorsed]: No. 2491. United States Circuit Court of Appeals for the Ninth Circuit. Rialto Irrigation District, a Corporation, Plaintiff in Error, vs. N. W. Stowell, Defendant in Error, and N. W. Stowell, Plaintiff in Error, vs. Rialto Irrigation District, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error and Cross-writ of Error to the United States District Court for the Southern District of California, Southern Division.

Received and filed September 29, 1914.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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**[Order Extending Time to June 1, 1914, to Docket  
Cause on Writ of Error.]**

*In the United States Circuit Court of Appeals,  
Ninth Judicial Circuit.*

RIALTO IRRIGATION DISTRICT,  
Plaintiff in Error,  
vs.

N. W. STOWELL,

Defendant in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of June, 1914.

Dated at Los Angeles, April 10th, 1914.

OLIN WELLBORN,  
United States District Judge, for the Southern District of California.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Rialto Irrigation District, Plaintiff in Error, vs. N. W. Stowell, Defendant in Error. Order Enlarging Time to

Docket Cause and File Record. Filed Apr. 13, 1914.  
F. D. Monckton, Clerk.

**[Order Extending Time to August 1, 1914, to Docket  
Cause on Writ of Error.]**

*In the United States Circuit Court of Appeals,  
Ninth Judicial Circuit.*

RIALTO IRRIGATION DISTRICT,

Plaintiff in Error,

vs.

N. W. STOWELL,

Defendant in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of August, 1914.

Los Angeles, May 27th, 1914.

OLIN WELLBORN,

United States District Judge, Southern District of  
California.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Rialto Irrigation District, Plaintiff in Error, vs. N. W. Stowell, Defendant in Error. Order Enlarging Time to File Record, etc. Filed Jun. 2, 1914. F. D. Monckton, Clerk.

[Order Extending Time to October 1, 1914, to  
Docket Cause on Writ of Error.]

*In the United States Circuit Court of Appeals,  
Ninth Judicial Circuit.*

RIALTO IRRIGATION DISTRICT,

Plaintiff in Error,

vs.

N. W. STOWELL,

Defendant in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of October, 1914.

Dated at Los Angeles, July 28, 1914.

OLIN WELLBORN,

United States District Judge, for the Southern District of California.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Rialto Irrigation District, Plaintiff in Error, vs. N. W. Stowell, Defendant in Error. Order Enlarging Time to Docket Cause and File Record. Filed Jul. 30, 1914. F. D. Monckton, Clerk.

No. 2491. United States Circuit Court of Appeals for the Ninth Circuit. Three Orders Under Rule 16 Enlarging Time to Oct. 1, 1914, to File Record Thereof and to Docket Case. Refiled Sep. 29, 1914. F. D. Monckton, Clerk.



*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

Circuit Court No. 1419.

C. C. A. No. 2491.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT, a Corpora-  
tion,

Defendant.

Circuit Court No. 1407.

C. C. A. No. 2492.

BURT CHELLIS,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT, a Corpora-  
tion,

Defendant.

Circuit Court No. 1602.

C. C. A. No. 2493.

BURT CHELLIS,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT, a Corpora-  
tion,

Defendant.

**Stipulation as to Printing Record and as to  
Judgment on Writs of Error.**

WHEREAS, in each of the above-entitled actions,  
brought in the United States District Court, South-

ern District of California, Southern Division, a judgment of that Court has been entered in favor of the plaintiff and against the defendant; and

WHEREAS, in each of said actions, the defendant has prosecuted a writ of error from said judgment entered therein, generally and as to the entire judgment, and the plaintiff has also prosecuted a writ of error from such judgment in part and as to certain particulars; and

WHEREAS, each of said actions was brought to recover upon certain bonds issued by the defendant, all of like tenor and part of the same series, and the facts and questions involved upon such writs in each of said actions are essentially the same, and the record in each case is substantially identical, so far as affects the questions involved upon the prosecution of such writs of error.

THEREFORE, IT IS HEREBY STIPULATED by and between the plaintiff and the defendant in each and all of said actions as follows:

1. That the record to be used in the prosecution of the first of said actions above mentioned (No. 1419) be printed, according to the rules and practice of the United States Circuit Court of Appeals for the Ninth Circuit, the one record so printed to be applicable both to the writ of error prosecuted by the defendant and to the writ of error prosecuted by the plaintiff in that action, and that both said writs be presented on such record and by the same briefs.

2. That pending the determination of said writs in said action No. 1419, the record in each of said other actions (Nos. 1407 and 1602) be not printed,

nor any proceeding be had as to the prosecution of said writs in either of said two actions, either on the part of the defendant or on the part of the plaintiff, but that the prosecution of said writs rest in abeyance.

3. That if, upon the determination of the said writs of error in said first mentioned action, the judgment of the lower court be reversed or modified, a like judgment of reversal or modification (in so far as the rule or ground of modification may be applicable) shall thereupon be entered in each of said other two actions, upon the said writs of error so prosecuted in each of said two actions.

4. That if upon the determination of the said writs of error in the said first-mentioned action, the judgment of the lower court be affirmed, a like judgment of affirmance (in so far as the rule or ground of affirmance may be applicable) shall thereupon be entered in each of said other two actions.

5. If upon a determination of said action No. 1419, it shall be found by the Court impracticable for any reason to render a like judgment in cases No. 1407 and 1602, or either of them, as contemplated by this stipulation or for any reason shall fail or decline to render such like judgment in cases No. 1407 and 1602, then, in that event, plaintiff in error or the defendant in error, in each of said cases, shall have the right to file the record and docket the case in each of said cases, with the clerk of said Court, within ninety days after judgment may be entered in said Court of Appeals in case No. 1419, and the said Court may, upon the filing of this stipu-

lation, make an appropriate order, extending the time for plaintiff in error and defendant in error in each of said actions No. 1407 and 1602, to file the record and docket the case in each of said two actions, as herein provided; provided, however, that if said Court, upon rendering its said judgment on said Writs of Error, in said case No. 1419, shall also render a judgment in said other cases No. 1407 and 1602, as contemplated by this stipulation, then in that event, said order extending such time as aforesaid, shall thereupon become and be inoperative and of no effect.

No. 1419.

BURT CHELLIS,

J. W. SWANWICK,

Attorneys for Plaintiff.

HENRY GOODCELL,

F. A. LEONARD,

Attorneys for Defendant.

No. 1407.

BURT CHELLIS,

J. W. SWANWICK,

Attorneys for Plaintiff.

HENRY GOODCELL,

F. A. LEONARD,

Attorneys for Defendant.

No. 1602.

BURT CHELLIS,

J. W. SWANWICK,

Attorneys for Plaintiff.

HENRY GOODCELL,

F. A. LEONARD,

Attorneys for Defendant.



[Endorsed]: Original. No. 2491. In the United States Circuit Court of Appeals, for the Ninth Circuit. Circuit Court No. 1419. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, a Corporation, Defendant. Circuit Court No. 1407. Burt Chellis, Plaintiff, vs. Rialto Irrigation District, a Corporation, Defendant. Circuit Court No. 1602. Burt Chellis, Plaintiff, vs. Rialto Irrigation District, a Corporation, Defendant. Stipulation Waiving Printing of Record and as to Judgment on Writ of Error. Filed Oct. 6, 1914. F. D. Monckton, Clerk.

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At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

**[Order Waiving Printing of Record in Case No. 2492,  
Allowing Cause to be Heard and Determined on  
Records and Briefs in Case No. 2491, and  
Providing for Entry of Judgment.]**

No. 2492.

RIALTO IRRIGATION DISTRICT, a Corpora-  
tion,

Plaintiff in Error,

vs.

BURT CHELLIS,

Defendant in Error,

and

BURT CHELLIS,

Plaintiff in Error,

vs.

RIALTO IRRIGATION DISTRICT, a Corpora-  
tion,

Defendant in Error,

On motion of Mr. Vincent Surr, on behalf of counsel for the respective parties, and agreeably to the stipulation of counsel for the respective parties this day filed therefor, IT IS ORDERED that the original certified Transcript of Record on the writ of error and on the cross-writ of error, respectively, in the above-entitled cause need not be printed, and that the cause on said writ of error and cross-writ of error may be heard and determined on the Transcripts of Record filed, and on the briefs of counsel to be hereafter filed, in the cause entitled Rialto Irrigation District, a Corporation, Plaintiff in Error, vs. N. W. Stowell, Defendant in Error, and N. W.

Stowell, Plaintiff in Error, vs. Rialto Irrigation District, a Corporation, Defendant in Error, No. 2491, in this court, and that upon the decision of the latter cause by this Court, and the filing and entering of the judgment of this Court therein, a like Judgment, in such form as the Court may deem proper, shall thereupon be filed and entered herein as contemplated by the said stipulation of counsel.

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At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

**[Order Waiving Printing of Record in Case No. 2493, Allowing Cause to be Heard and Determined on Records and Briefs in Case No. 2491, and Providing for Entry of Judgment.]**

No. 2493.

RIALTO IRRIGATION DISTRICT, a Corporation,

Plaintiff in Error,

vs.

BURT CHELLIS,

Defendant in Error,

and

BURT CHELLIS,

Plaintiff in Error,

vs.

RIALTO IRRIGATION DISTRICT, a Corporation,  
tion,

Defendant in Error,

On motion of Mr. Vincent Surr, on behalf of counsel for the respective parties, and agreeably to the stipulation of counsel for the respective parties this day filed therefor, IT IS ORDERED that the original certified Transcript of Record on the writ of error and on the cross-writ of error, respectively, in the above-entitled cause need not be printed, and that the cause on said writ of error and cross-writ of error may be heard and determined on the Transcripts of Record filed, and on the briefs of counsel to be hereafter filed, in the cause entitled Rialto Irrigation District, a Corporation, Plaintiff in Error, vs. N. W. Stowell, Defendant in Error, and N. W. Stowell, Plaintiff in Error, vs. Rialto Irrigation District, a Corporation, Defendant in Error, No. 2491, in this court, and that upon the decision of the latter cause by this Court, and the filing and entering of the judgment of this Court therein, a like Judgment, in such form as the Court may deem proper, shall thereupon be filed and entered herein as contemplated by the said stipulation of counsel.





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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N. W. STOWELL,

Plaintiff in Error,

VS.

RIALTO IRRIGATION DISTRICT, a Corporation,

Defendant in Error.

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**Transcript of Record.**

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Upon Cross-Writ of Error to the United States District  
Court for the Southern District of California,  
Southern Division.

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*In the District Court of the United States for the  
Southern District of California, Southern Divi-  
sion.*

No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

**Writ of Error [Sued Out by N. W. Stowell  
(Original)].**

United States of America,

Southern District of California,—ss.

The President of the United States of America to  
the Judges of the District Court of the United  
States, Southern District of California, South-  
ern Division, Greeting:

Because in the record and proceedings, and also  
in the rendition of the judgment of a plea which is  
in the said District Court before you, between N. W.  
Stowell, plaintiff, and Rialto Irrigation District, de-  
fendant, a manifest error, as appears from the as-  
signment of error on file herein, hath happened to  
the great damage of the said N. W. Stowell, plain-  
tiff, and it being fit that the error, if any there hath  
been, should be duly corrected, and full and speedy  
justice done to the parties aforesaid in this behalf,  
you are hereby commanded, if judgment be therein  
given, that then, under your seal, distinctly and  
openly, you send the records and proceedings afore-



said, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, on the 5th day of May next, in the said United States Circuit Court of Appeals to be there and then held, that the record and proceedings aforesaid *be* inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done. [3]

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 6th day of April, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-eighth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States, for the Southern District of California.

By Chas. N. Williams,

Deputy Clerk.

The above writ of error is hereby allowed.

OLIN WELLBORN,

Judge.

I hereby certify that a copy of the within writ of error was on the 6th day of April, 1914, lodged in the Clerk's Office of the said United States District

Court for the Southern District of California, for the said defendant in error.

WM. M. VAN DYKE,

Clerk of the United States District Court, Southern District of California.

By Chas. N. Williams,

Deputy Clerk. [4]

[Endorsed]: No. 1419. In the District Court of the United States for the Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, Defendant. Writ of Error. Filed Apr. 6, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [5]

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*In the District Court of the United States, for the Southern District of California, Southern Division.*

No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

**Citation on Writ of Error [Sued Out by N. W. Stowell (Original)].**

United States of America,—ss.

To Rialto Irrigation District, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city

of San Francisco, in the State of California, on the 5th day of May, 1914, pursuant to a writ of error on file in the clerk's office of the District Court of the United States, Southern District of California, Southern Division, in that certain action No. 1419, wherein N. W. Stowell, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against said N. W. Stowell in said writ of error mentioned should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable OLIN WELLBORN, United States District Judge for the Southern District of California, Southern Division, this 6th day of April, 1914, and of the Independence of the United States the 138th.

OLIN WELLBORN,  
United States District Judge for the Southern District of California, Southern Division. [6]

[Endorsed]: Original. No. 1419. In the District Court of the United States for the Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, Defendant. Citation on Writ of Error. Service of Writ of Error Waived. Rec'd Copy Hereof this 7th day of April, 1914. Henry Goodcell and F. A. Leonard, Attys. for Deft. Filed Apr. 20, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [7]

**Names and Addresses of Attorneys.**

For Plaintiff in Error:

BURT CHELLIS, Esq., Los Angeles, California; and

J. W. SWANWICK, Esq., 1116-1118 Hibernian Building, Los Angeles, California.

For Defendant in Error:

HENRY GOODCELL, Esq., Old Postoffice Block, San Bernardino, California; and

F. A. LEONARD, Esq., Old Postoffice Block, San Bernardino, California. [8]

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*In the District Court of the United States of America, in and for the Southern District of California, Southern Division.*

C. C. No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant. [9]

*In the District Court of the United States for the Southern District of California, Southern Division.*

No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.



**Petition for a Writ of Error [on Behalf of N. W. Stowell].**

N. W. Stowell, plaintiff in the above-entitled cause, feeling himself aggrieved by the judgment entered on the 6th day of October, 1913, comes now by J. W. Swanwick, his attorney, and files herewith an assignment of error, and petitions said Court for an order allowing said plaintiff to procure a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error.

And your petitioner will ever pray.

Dated, April 3, 1914.

J. W. SWANWICK,  
Attorney for Petitioner.

[Endorsed]: No. 1419. In the District Court of the United States for the Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, Defendant. Petition for a Writ of Error. Filed Apr. 6, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Swanwick & McCormick, Attorneys at Law, 1116-1118 Hibernian Building, S. E. Cor. 4th & Spring Sts., Los Angeles, Cal. [10]

*In the District Court of the United States for the  
Southern District of California, Southern Division.*

No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

**Order Allowing Writ of Error [on Behalf of N. W.  
Stowell] and Fixing Amount of Security.**

Upon motion of J. W. Swanwick, attorney for plaintiff, and upon filing a petition for writ of error and an assignment of error, it is ordered that a writ of error, be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein.

It is further ordered that the amount of the bond to be given by the plaintiff in error be, and the same is hereby, fixed at \$300.00.

Dated, 6th April, 1914.

OLIN WELLBORN,

Judge.

[Endorsed]: No. 1419. In the District Court of the United States for the Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, Defendant. Order Allowing Writ of Error and Fixing Amount of Security. Filed Apr. 6, 1914. Wm. M. Van Dyke,

Clerk. By Chas. N. Williams, Deputy Clerk.  
Swanwick & McCormick, Attorneys at Law, 1116-  
1118 Hibernian Building, S. E. Cor. 4th & Spring  
Sts., Los Angeles, Cal. [11]

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*In the District Court of the United States for the  
Southern District of California, Southern Divi-  
sion.*

No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

**Assignment of Errors [on Behalf of N. W. Stowell].**

Comes now N. W. Stowell, plaintiff in the above-entitled action, and files the following assignment of errors, upon which he will rely upon his prosecution of the writ of error in the above-entitled cause, petition for which writ of error is filed at the same time with this assignment of error:

I.

The trial Court erred in failing to allow plaintiff interest upon the interest coupons mentioned and described in the complaint, amended complaint, and supplemental complaint herein.

II.

The trial Court should have given judgment for interest upon the interest coupons described in the complaint, amended complaint, and supplemental complaint herein from the date of the maturity of

each of said interest coupons to the date of the judgment herein, at the rate of 7% per annum.

### III.

Said Court erred in failing to give judgment for interest upon the interest coupons described in the complaint, the amended complaint, and supplemental complaint herein, as prayed for in said complaint, amended complaint, and supplemental complaint.

### IV.

Said Court gave judgment for plaintiff for the amount of principal of the interest coupons mentioned and described in the [12] complaint, amended complaint, and supplemental complaint herein, but did not give judgment for any interest upon any of said interest coupons and thereby committed error.

J. W. SWANWICK,  
Attorney for Plaintiff.

And upon the foregoing Assignment of Error and upon the record in said cause, plaintiff prays that an order be entered herein directing the trial Court to enter judgment herein for the principal of the installment coupons mentioned and described in the complaint, amended complaint, and supplemental complaint herein, and for the principal of the interest coupons mentioned and described in said complaint, amended complaint, and supplemental complaint, and for interest upon said interest coupons at the rate of 7% per annum from the date of the maturity of said respective interest coupons to the



date of the entry of said judgment at the rate of 7% per annum.

J. W. SWANWICK,  
Attorney for Plaintiff.

[Endorsed]: No. 1419. In the District Court of the United States for the Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, Defendant. Assignment of Errors. Filed Apr. 6, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Swanwick & McCormick, Attorneys at Law, 1116-1118 Hibernian Building, S. E. Cor. 4th & Spring Sts., Los Angeles, Cal. [13]

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*In the District Court of the United States for the  
Southern District of California, Southern Division.*

No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

**Bond [on Writ of Error Sued Out by N. W. Stowell].**

KNOW ALL MEN BY THESE PRESENTS: That we, E. M. Durant and W. E. Stowell, are held and firmly bound unto the above-named Rialto Irrigation District in the sum of three hundred dollars (\$300.00), to be paid to the said Rialto Irrigation District, for the payment of which, well and truly to be made, we bind ourselves and each of us, our

and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 6 day of April, 1914.

Whereas, the above-named plaintiff, N. W. Stowell, has prosecuted his writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment given in the above-entitled cause by the said District Court of the United States, Southern District of California, Southern Division.

Now, therefore, the condition of this obligation is such, that if the above-named N. W. Stowell shall prosecute said writ of error to effect and answer all judgments and costs if he fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

E. M. DURANT.

W. E. STOWELL.

State of California,  
County of Los Angeles,—ss.

E. M. Durant, and W. E. Stowell, [14] the sureties whose names are subscribed to the above undertaking being severally duly sworn, each for himself says: That he is a resident and freeholder in the Southern District of the State of California, and is worth the sum in said undertaking specified as the penalty thereof, over and above his just debts and liabilities, exclusive of property exempt from execution.

E. M. DURANT,

W. E. STOWELL.

Subscribed and sworn to before me this 6 day of April, 1914.

[Seal]

CHAS. E. DONNELLY, Jr.

Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: No. 1419. In the District Court of the United States for the Southern District of California, Southern Division. N. W. Stowell, Plaintiff, vs. Rialto Irrigation District, Defendant. Bond—Approved. Olin Wellborn, Judge. Filed Apr. 6, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Swanwick & McCormick, Attorneys at Law, 1116-1118 Hibernian Building, S. E. Cor. 4th & Spring Sts., Los Angeles, Cal. [15]

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UNITED STATES OF AMERICA.

*District Court of the United States, Southern District of California, Southern Division.*

CLERK'S OFFICE.

C. C. No. 1419.

STOWELL

vs.

RIALTO IRRIGATION DISTRICT.

**Praeipie [for Transcript of Record on Cross-writ  
of Error].**

To the Clerk of Said Court:

Sir: Please add to the record ordered by the defendant in the above action the following papers on the part of plaintiff, viz.:

Petition for Writ of Error.

Order Allowing Writ.

Writ.

Assignment of Errors Bond.

J. W. SWANWICK,

Atty. for Plaintiff.

[Endorsed]: C. C. No. 1419. U. S. District Court, Southern District of California, Southern Division. Stowell vs. Rialto Irrigation District. Praecipe for Record on Writ of Error. Filed Aug. 19, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [16]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record on Cross-Writ of Error.]**

*In the District Court of the United States, in and  
for the Southern District of California, South-  
ern Division.*

C. C. No. 1419.

N. W. STOWELL,

Plaintiff,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing sixteen (16) typewritten pages, numbered from 1 to 16, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Petition for Writ of Error, Order Allowing Writ of



Error, Assignment of Errors, Bond and Praeipie for Transcript, in the above and therein entitled cause; and I do further certify that the foregoing constitutes the record in said cause as specified in said Praeipie filed in my office by the attorneys of record for said plaintiff and plaintiff in error.

I do further certify that the cost of the foregoing record is \$5.60, the amount whereof has been paid me by N. W. Stowell, the plaintiff in error in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 25th day of September, in the year of our Lord one thousand nine hundred and fourteen, and of our Independence the one hundred and thirty-ninth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [17]

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[Endorsed]: No. 2491. United States Circuit Court of Appeals for the Ninth Circuit. N. W. Stowell, Plaintiff in Error, vs. Rialto Irrigation District, a Corporation, Defendant in Error. Transcript of Record. Upon Cross-Writ of Error to the

United States District Court for the Southern District of California, Southern Division.

Received and filed September 29, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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**[Order Extending Time to June 1, 1914, to Docket  
Cause on Cross-Writ of Error.]**

*In the United States Circuit Court of Appeals,  
Ninth Judicial Circuit.*

N. W. STOWELL,

Plaintiff in Error,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same hereby is enlarged and extended to and including the 1st day of June, 1914.

Los Angeles, April 10th, 1914.

OLIN WELLBORN,

United States District Judge, for the Southern District of California.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. N. W.

Stowell, Plaintiff in Error, vs. Rialto Irrigation District, Defendant in Error. Order Enlarging Time to Docket Cause and File the Record. Filed Apr. 13, 1914. F. D. Monckton, Clerk.

**[Order Extending Time to August 1, 1914, to Docket Cause on Cross-Writ of Error.]**

*In the United States Circuit Court of Appeals,  
Ninth Judicial Circuit.*

N. W. STOWELL,

Plaintiff in Error,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant in Error.

Good cause appearing therefor, it is hereby ordered that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same hereby is enlarged and extended to and including the 1st day of August, 1914.

Los Angeles, May 27th, 1914.

OLIN WELLBORN,

United States District Judge, Southern District of California.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. N. W. Stowell, Plaintiff in Error, vs. Rialto Irrigation District, Defendant in Error. Order Enlarging Time to File Record, etc. Filed Jun. 2, 1914. F. D. Monckton, Clerk.

**[Order Extending Time to October 1, 1914, to Docket Cause on Cross-Writ of Error.]**

*In the United States Circuit Court of Appeals,  
Ninth Judicial Circuit.*

N. W. STOWELL,

Plaintiff in Error,

vs.

RIALTO IRRIGATION DISTRICT,

Defendant in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same hereby is enlarged and extended to and including the 1st day of October, 1914.

Los Angeles, July 28th, 1914.

OLIN WELLBORN,

United States District Judge for the Southern District of California.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. N. W. Stowell, Plaintiff in Error, vs. Rialto Irrigation District, Defendant in Error. Order Enlarging Time to Docket Cause and File Record. Filed Jul. 30, 1914. F. D. Monckton, Clerk.

No. 2491. United States Circuit Court of Appeals for the Ninth Circuit. Three Orders Under Rule 16 Enlarging Time to Oct. 1, 1914, to File Record Thereof and to Docket Case. Refiled Sep. 29, 1914. F. D. Monckton, Clerk.





No. 2491.

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UNITED STATES

Circuit Court of Appeals<sup>2</sup>

FOR THE NINTH CIRCUIT.

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RIALTO IRRIGATION DIS-	}
TRICT, A CORPORATION,	
Plaintiff in Error.	
vs.	
N. W. STOWELL,	}
Defendant in Error.	

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BRIEF FOR PLAINTIFF IN ERROR.

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F. A. LEONARD,  
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LEONARD and SURR.  
Attorneys for Rialto Irrigation District.

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John Flagg, Brief and Transcript Printing a Specialty, San Bernardino, Cal.

Filed

JAN - 8 1915

F. D. Monckton,



No. 2491.

UNITED STATES

# Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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RIALTO IRRIGATION DIS-	}
TRICT, A CORPORATION,	
Plaintiff in Error.	
VS.	
N. W. STOWELL,	}
Defendant in Error.	

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## BRIEF FOR PLAINTIFF IN ERROR.

### Statement of the Case.

The plaintiff in error is an irrigation district organized under the laws of the State of California, under what is commonly known as the "Wright Act." The questions involved in this case and two other cases, No. 2392 and 2493, which, by stipulation and order of Court, are to stand submitted upon the record and briefs in this case, (Transcript, pages 149, 151,) involve nearly two hundred thousand dollars and are of far reaching importance, not only to the plaintiff in error, but to numerous other irrigation districts in the State, which have heretofore issued bonds in amounts aggregating many millions of dollars.



This action was originally brought on June 27th, 1908, by defendant in error, to recover \$30,009.00, together with interest, alleged to be due upon certain coupons issued by the plaintiff in error. (Tr., pgs. 15, 16.) Subsequently on July 5th, 1912, the defendant in error filed an amended and later a supplemental complaint, increasing his demand to \$50,577.70, together with interest. (Tr., p. 48.)

The plaintiff in error issued its bonds in the amount of \$500,000.00, bearing date November 17th, 1890. They were all of the same tenor. One of such bonds is set out in full in the amended complaint. (Tr., p. 20.) To these bonds were attached installment coupons and also interest coupons. Defendant in error sues to recover upon both installment and interest coupons. The answer to the amended complaint admits that the officers of the district purported to issue said bonds, but avers that none of them were ever lawfully issued and that all of the acts of its officers in issuing the bonds were unauthorized and void; that none of the bonds were properly dated or made payable as required by law; that none of them were issued for a valid or lawful consideration, and that all of the coupons maturing four years or more before being sued upon were barred by the Statute of Limitations. (Tr., pgs. 37-38.) The court gave judgment for the full amount sued for, without compounding interest. (Tr., p. 50.) Both parties have sued out writs of error. The defendant in error claims the court should have given him judgment for compound interest or interest upon all overdue in-

terest coupons, in addition to the amount allowed him, while plaintiff in error contends that the judgment of the court should have been in its favor. The bill of exceptions appears on pages 51 to 124 of the transcript.

The specifications of error, as assigned, (Tr., 126-131,) here follow and thereafter, the argument, in which the specified errors, which seem most important, are discussed.

### **Specifications of Error.**

1. The court erred in overruling the defendant's demurrer to the amended complaint, for the reason that said amended complaint does not state facts sufficient to constitute a cause of action.

2. The court erred in overruling said demurrer as to the first count of said complaint, for the reason that said first count does not state facts sufficient to constitute a cause of action.

3. The court erred in overruling said demurrer as to the second count of said complaint, for the reason that said second count does not state facts sufficient to constitute a cause of action.

4. The court erred in rendering the judgment made and entered in this cause, for the reason that the amended complaint does not sustain said judgment, nor any part thereof.

5. The court erred in rendering said judgment, for the reason that the supplemental complaint does not sustain said judgment nor any part thereof.

6. The court erred in rendering said judgment, for

the reason that no findings of fact were made or filed, and such findings were not waived.

7. The court erred in rendering said judgment, for the reason that no proper or sufficient findings of fact were made or filed, and such findings were not waived.

8. The court erred in rendering said judgment, for the reason that the facts found expressly or by implication, are not sufficient to justify the conclusions based thereon or the said judgment, and particularly in the following respects:

(a) The facts so found show that none of the bonds alleged in the amended complaint or in the supplemental complaint bore date at the time of their issue, as required by the statute authorizing the issue of bonds by the defendant.

(b) Said facts show that none of said bonds ran, by their terms, for the length of time they were required to run by the provisions of said statute,

(c) Said facts show that none of said bonds were negotiable in form, as required by the provisions of said statute.

(d) Said facts show that certain coupons alleged and sued upon in the amended complaint matured more than four years prior to the commencement of the action, and the alleged cause of action as to each and all of said coupons was barred by statute of limitations, as pleaded in the defendant's amended answer.

(e) Said facts show that certain coupons alleged and sued upon in the supplemental complaint matured more than four (4) years prior to the filing of said supple-

mental complaint, and the alleged cause of action as to each and all of said coupons was barred by statute of limitation, as pleaded in said amended answer (said answer and plea, by stipulation, being made to apply as an answer and plea to said supplemental complaint).

9. The court erred in making its findings of fact, express or implied, for the reason that certain of such findings, necessary to sustain the conclusions and judgment of the court, were not justified by the evidence, and were without substantial support by any evidence, and particularly in the following respects:

(a) There was no evidence to justify or support the finding to the effect that said bonds or any of them bore date at the time of their issue.

(b) There was no evidence to justify or support the finding to the effect that said bonds, or any of them, ran by their terms, or ran in fact, for the term or period prescribed by statute.

(c) There was no evidence to justify or support the finding to the effect that said bonds, or any of them were negotiable in form, or in the form required by the statute under which they are alleged to have been issued.

(d) There was no evidence to justify, or support the finding to the effect that said bonds, or any of them, were issued or delivered for a lawful or valid consideration.

(e) There was no evidence to justify or support the finding to the effect that said bonds, each and all of them, were not issued or delivered for a consideration,



which, wholly or in great part, consisted in the doing of construction work for the defendant.

(f) There was no evidence to justify or support the finding to the effect that none of said bonds were issued or delivered for a consideration which, wholly or in great part, consisted in the doing of construction work for the defendant.

(g) There was no evidence to justify or support the finding to the effect that said bonds, or any of said bonds, were issued or delivered to any purchaser or taker on November 17, 1890, or on January 1, 1891, or at the time of their actual date or their apparent date or their alleged date.

(h) There was no evidence to justify or support the finding to the effect that said bonds, or any of them, were ever lawfully issued, or were lawful obligations of the defendant.

(i) There was no evidence to justify or support the finding to the effect that the board of directors of the defendant, on December 12th, 1890, or at any time, brought an action in the Superior Court of San Bernardino counts to determine the validity of said bonds, or any of them.

(j) There was no evidence to justify or support the finding to the effect that on January 3, 1891, or at any time, said superior court, by a judgment duly given and made in said action or given or made at all, declared said bonds or any of them to be valid.

(k) There was no evidence to justify or support the finding to the effect that the plaintiff acquired or pur-

chased said bonds or coupons, or any of them, in good faith and in the ordinary course of business, without knowledge or notice of their invalidity, or of any defense thereto.

(i) There was no evidence to justify or support the finding to the effect that the plaintiff did not acquire or purchase said bonds and coupons, or any of them, with notice or knowledge of each or any of the facts alleged in the defendant's amended answer to the amended complaint as grounds of their invalidity and as defenses thereto.

(m) There was no evidence to justify or support the finding to the effect that none of the causes of action alleged in the amended complaint, as to any of the coupons therein sued upon, was barred by statute of limitation, as pleaded in the defendant's amended answer.

(n) There was no evidence to justify or support the finding to the effect that none of the causes of action alleged in the supplemental complaint, as to any of the coupons therein sued upon, was barred by statute of limitation, as pleaded in said amended answer.

10. The court erred in rendering its said judgment, for the reason that the amount of said judgment is in excess of the aggregate amount of all coupons alleged and sued upon in the amended complaint and the supplemental complaint.

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## ARGUMENT.

### POINT I.

The Court erred in rendering said judgment for the

reason that certain coupons sued upon in the amended complaint and in the supplemental complaint matured more than four years prior to the commencement of the action, and the alleged cause of action as to each and all of said coupons was barred by the Statute of Limitations, as pleaded in the defendant's amended answer. (Subdivisions (d) and (e) of Specification 8). (Tr., p. 128.)

In the amended answer of plaintiff in error, the Irrigation District pleaded that as to all coupons, including both interest and principal coupons, which by their terms were payable four years or more before the commencement of the action, the action was barred by the provisions of section 443, (intending thereby to mean 343) by the provisions of subdivision 1 of section 337 and of subdivision 1 of section 338 of the Code of Civil Procedure of the State of California. (Tr., p. 38.)

By stipulation, this plea and answer were made applicable to the supplemental complaint. (Tr., pgs. 40-41.)

Sections 337 and 338 are found in Chapter III of title II of Part II of the code, which title specifies the time within which actions must be commenced in this State, and subdivision I of section 337 is as follows:

“Within four years:—

1. An action upon any contract, obligation or liability founded upon an instrument in writing executed within this State; provided, that whatever the time within which any such action must be so commenced would in any case expire by the terms of this section after the first day of June, one thousand nine hundred and six and before the first day

of January, one thousand nine hundred and seven, such action may be commenced at any time before the first day of January, one thousand nine hundred and seven, with the same force and effect as if commenced within four years as in this section provided." (All italics in this brief are ours.)

Subdivision I of section 338 is as follows:

"Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture."

Section 343 of the same code is as follows:

"ACTIONS FOR RELIEF NOT HEREIN-  
BEFORE PROVIDED FOR. An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

As if to emphasize the well established rule that statutes of limitation embrace *all kinds of actions*, and do not admit of any exception—not specified by the legislature—being made to their operation and comprehensiveness, it is further provided in Section 312 of Title II of Part II of the same code that:

**'COMMENCEMENT OF CIVIL ACTIONS.**

Civil actions, *without exception*, can *only* be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

It cannot be for an instant successfully contended that, with respect to Irrigation District Bonds, a special limitation has been prescribed by the legislature, and therefore, all of the language of this section following



the word "accrued" may be dismissed from consideration, and we respectfully submit that, in the face of such plain and unambiguous language, no construction can be placed upon Section 312, whereby an exception to its unmistakable terms can be imported therein, without striking down the well-settled principle, that the courts will not undertake to insert in a statute something which has been omitted therefrom. This well-founded rule has been crystallized in our Code of Civil Procedure by section 1858, which says:

"In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, *not to insert what has been omitted*, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

Upon the same subject, in *City of Eureka vs. Diaz*, 89 Cal., 467, says the California Supreme Court:

"It is a cardinal rule in the construction of statutes that the intent of the legislator should be followed, but this is subject to the imperative and paramount rule that the court cannot depart from the meaning of language which is free from ambiguity, although the consequence would be to defeat the object of the act. In *Rex vs. Barham*, 8 Barn. & C., 99, the court said: 'Our decision may, in this particular case, operate to defeat the object of the act; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to

what we may suppose to have been the intention of the legislature.' In *Smith vs. State*, 66 Md., 217, the court said: 'Even when a court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity. As was said by Lord Denman in *Green vs. Wood*, 7 Ad. & E., N. S., 185: 'Those who used the words thought that they had effected the purpose intended. But we, looking at the words as judges, are no more justified in introducing that meaning than we should be if we added any other provision. We can do no more than give such a meaning as the words authorize.' The Supreme Court of Ohio in *Woodbury vs. Barry*, 18 Ohio, 462, emphatically say: 'It is our legitimate function to interpret legislation, but *not to supply its omissions.*'

"The business of the interpreter is, of course, to seek for the intention of the legislature; but that intention is not to be ascertained at the expense of the true meaning of the words. 'The court knows nothing of the intention of an act, *except from the words* in which it is expressed, \* \* the meaning of the law being the law itself \* \* Every departure from the clear language of a statute is, in effect, an assumption of legislative powers by the court.' "

See also *U. S. vs. Hartwell*, 18 L. Ed., (U. S.), 832.

*U. S. vs. Wiltberger*, 5 Wheat, 92, and Endlich on Interpretation of Statutes, pages 6, 7, 8, 9, 10 and 11.

Referring to the adding of exceptions by the courts, to statutes of limitations, the California Supreme Court, in *Tynan vs. Walker*, 35 Cal., 634, says:

“If they may add at all to the exceptions provided for in the statute, under the pretense that the case before them is of equal equity with those given in the statute, who is to fix the limit to their interpolations, or establish the line between legislative and judicial functions? If they may add one to the list of excepted cases, by parity of reason they may add another, and so on until the entire body of the statute has become emasculated, and the will of the judiciary substituted for that of the legislature. How much more in keeping with the legitimate exercise of judicial functions are those cases where it has been held that *the Courts can create no exceptions where the legislature has made none.* \* \* \* Said Mr. Chancellor Kent, (page 142:)

“The doctrine of an inherent equity creating an exception as to any disability, where the statute of limitations creates none, has been long, and I believe, uniformly exploded. General words in the statute must receive a general construction, and *if there be no express exception, the court can create none.*”

Again in *Morrow vs. Barker*, 119 Cal., 65, the same court says:

“Here is a statute of limitations. The holder of no claim is excepted from its disability, saving him alone who has been absent from the State. A court *is not authorized to make an exception* to relieve from hardship or to aid apparent equities.”

It was also said in *Vandall vs. Teague*, 142 Cal., 471, that:

“The statute of limitations is a general statute, and must be applied generally and *in all cases* where exception to its operation is not specifically made.”

It would seem argument is superfluous, respecting the obvious meaning of the statute and of the authorities we have cited, unless we attribute to the English language an utter inability to convey thought or intent, and when section 312 C. C. P., expressly says that civil actions, *without exception*, can *only* be commenced within the periods prescribed in Title II of the Code, “after the cause of action shall have accrued,” it becomes important to ascertain *when the cause of action accrued* in the case at bar and in the solution of this question; as well as in determining the scope and meaning of these limitations of actions prescribed by our State legislature, we submit this court will be guided by the decisions of the Supreme Court of this State.

Referring to the Statute of Limitations, in the case of *Mather vs. San Francisco*, 115 Fed., 37, this court adopted the principle announced in *Leffingwell vs. Warren*, 17 L. Ed., (U. S.,) 261, and said:

“The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the Statute of Limitations of the several States, and give them the same construction and effect which are given by the local tribunals.”  
(Citing cases.)

The Supreme Court of the United States in the *Leffingwell* case, also said:

“The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the Statute, and is as binding



upon the courts of the United States as the text. (Citing Cases.)

“If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court *will follow the latest settled adjudications*. (Citing cases.)

In *Ross vs. Duval*, 10 L. Ed., (U. S.) 51, the United States Supreme Court said:

“As an act of limitation, it is impossible to distinguish this from other acts which limit the time of bringing certain actions, either by a designation of the ground or the form of the action.

These acts are of daily cognizance in the courts of the United States; and no one has ever doubted, that in fixing the rights of parties, *they must be regarded as well in the Federal as in the State courts.*”

In *Dibble vs. Bellingham Co.*, 41 L. Ed., (U. S.) 72, the same court said:

“No rule is more firmly established than that this court will follow the construction given by the Supreme Court of a State to a statute of limitations of a State (*Bauserman v. Blunt*, 147 U. S., 647 (37: 316), and we perceive no reason for disregarding it in this instance.”

In *Balkham vs. Woodstock Iron Co.*, 38 L. Ed., (U. S.), 953, the same Court said:

We think the rule under which we follow state statutes of limitation and the construction of such statutes by the state courts compels us to treat the doctrine here announced as conclusive of the present case, so far as this court is concerned. The

whole subject was very fully reviewed by this court in the case of *Bauserman vs. Blunt*, 147 U. S., 647 (37: 316). There, through Mr. Justice Gray, we said:

“ ‘By a provision inserted in the first Judiciary Act of the United States, and continued in force ever since, Congress has enacted that ‘the laws of the several States, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply’. Act of September 24, 1789, Chap. 20, Sec. 34, 1 Stat., at L. 92; Rev. Stat., 721. No laws of the several States have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real *and personal*, as enacted by the legislature of a State, and as construed by its highest court. (Citing cases).

“In *Patton vs. Easton*, 14 U. S., 1 Wheat, 476, 482 (4: 139, 141), and again in *Powell vs. Harman*, 27 U. S. 2 Pet., 241 (7: 411), this court had construed a Tennessee statute of limitations of real actions in accordance with decisions of the Supreme Court of the State, made since the first of those cases was certified up to this court, and supposed to have settled the construction of the statute. Yet in *Green vs. Neal*, 31 U. S., 6 Pet., 191 (8: 402), a judgment of the Circuit Court of the United States, which had held itself bound by those cases in this court, was reversed, because of *more recent decisions* of the State court, establishing the opposite construction.”

“Nor can the case before us be saved from the

operation of the rule thus stated by the contention that the Supreme Court of the State of Alabama has misconstrued its statutes or has adopted a rule of limitation or prescription in conflict therewith. In *Leffingwell vs. Warren*, 67 U. S., 2 Black, 599, 603 (17: 261, 262), Mr. Justice Swayne, speaking for the court, thus laid down the rule:

“ ‘The Courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several States, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the Judicial Act of 1789. The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the *latest settled adjudication*.’ ”

In *Metcalf vs. Watertown*, 38 L. Ed., (U. S.) 861, the same court also said:

“From the beginning this court has recognized statutes of limitations of actions, real *and personal*, as enacted by the legislature of a State, and as construed by its highest court, as rules of decision in the courts of the United States. \* \* \* \* \*

“It would be strange, if in the now well understood rights of nations to organize their judicial tribunals according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits

shall be litigated in their courts. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred has been, from a remote antiquity, fixed by every nation in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction. 'This being the foundation of the right to pass statutes of prescription or limitation, may not our States, under our system, exercise this right in virtue of their sovereignty? Or is it to be conceded to them in every other particular, than that of barring the remedy upon judgments of other States by the lapse of time?'

Upon the same subject, in *Tioga R. Co. vs. Blossburg, and C. R. Co.*, 22 L. Ed., (U. S.) 331, Mr. Justice Bradley, in delivering judgment said:

"These decisions upon the construction of the statute are binding upon us, whatever we may think of their soundness on general principles".

And in the concurring opinion in the same case, it is said:

"Statutes of limitation are in their nature arbitrary. They rest upon no other foundation than the judgment of a State as to what will promote the interests of its citizens. Each determines such limits and imposes such restraints as it thinks proper.

"In *Angell on the Limitation of Actions at Law*, at p. 14, Sec. 24, the author says: 'Under the 34th section of the Judiciary Act of 1789, 1 Stat. at L. 73, the Acts of Limitations of the several States, where no special provision has been made by Congress, form a rule of decision in the courts of the



United States, and the same effect is given to them as is given in the State courts. ' '

See also: McClaine vs. Rankin, 49 L. Ed., (U. S.) 702; Campbell vs. Haverhill, 39 L. Ed., (U. S.) 280; Lindsey vs. Gas Co., 55 L. Ed., (U. S.) 369; Brown Forman Co. vs. Kentucky, 54 L. Ed. (U. S.) 883; Flanigan vs. Sierra County, 49 L. Ed., (U. S.) 597; McClung vs. Silliman, 7 L. Ed., (U. S.) 676; Davie vs. Briggs, 24 L. Ed., (U. S.) 1086; Brunswick Terminal Co. vs. Bank, 99 Fed., (C. C. A.) 635; Fearing vs. Glenn, 73 Fed., (C. C. A.) 116; Bergman vs. Bly, 66 Fed., (C. C. A.) 40.

It is very clear that an action involving bonds is not immune from the application of the principles announced in the foregoing authorities, as those authorities show that the Federal Courts follow the State Courts in their construction of statutes of limitation, regardless of the subject matter which such statutes cover, and irrespective of whether the action in question be a real or personal one. In harmony with these views, in the case of Amy vs. Dubuque, 25 L. Ed., (U. S.) 228, where the plaintiff sued upon some municipal bonds, Mr. Justice Harlan, speaking for the court said:

"The question of limitation presented for our consideration upon this writ of error depends for its solution upon the statutes of Iowa. 'It is not to be questioned,' said this court in Hawkins vs. Barney, 5 Pet., 457, that laws limiting the time of bringing suit constitute a part of the *lex fori* of every country; they are laws for the administering justice, one of the most sacred and

important of sovereign rights.' " McElmoyle vs. Cohen, 13 Pet., 312.

It is as little to be questioned that "The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statute of limitations of the several States, and give them the same construction and effect which are given by the local tribunals." Leffingwell v. Warren, 2 Black, 599 (67 U. S., XVII, 261); Green vs. Neal, 6 Pet., 291; Harpending vs. Dutch Co., 16 Pet., 455; Davis vs. Briggs, 97 U. S., 628 XXIV, 1086.

In the light of this doctrine and again adverting to section 312 of the Code of Civil Procedure, we are now brought to the question as to when the statute commenced to run against the holder of these bonds, and the determination of this question necessarily, under section 312, depends upon the time of the accrual of the respective causes of action set forth in the amended and supplemental complaints herein. This is undeniable, because section 312, C. C. P., provides that "civil actions, *without exception*, can only be commenced within the periods prescribed in this title, *after the cause of action shall have accrued.*"

From this language, it is apparent the cause of action in any case must accrue before the statute is set in motion, and it is equally manifest that if the various causes of action sued upon herein have not accrued, then the defendant in error has no standing in this court. Furthermore—as in other investigations which relate to the statute of limitations—the federal courts, when it comes to deciding upon the time *when the statute commences to*

*run*, will follow the decisions of the highest court of the State, in which that question is agitated. In *Balkham vs. Woodstock Iron Co.*, 38 L. Ed. (U. S.), 953, the United States Supreme Court said:

“When the bar of the statute of prescription, under the laws and decisions of the State of Alabama, *began to be operative*, has been construed by the court of last resort of that State. Necessarily the determination of when the parties had a right to sue was a question concerning the construction when the prescription commenced to run, or when they were obliged to bring their action, whethor legal or equitable. Those questions were purely within the province of the Supreme Court of Alabama. In deciding them it passed upon its own statutes of limitations or the doctrine of prescription as applied by it, and *we are obliged to apply and enforce their conclusions*”

We respectfully submit that it requires no citation of authority to show that the elementary rule is thoroughly well settled in California, and practically everywhere else, that a cause of action upon a contract arises, as soon as a breach of such contract occurs, unless the case falls within some exception specified by statute.

“As a general rule, it is held a cause of action for a wrongful act, whether negligent or wilful, *or for the breach of a contract or duty, accrues immediately upon the happening of the wrongful act or the breach*, even though the actual damages resulting therefrom may not accrue until some time afterwards, and the statute, therefore, begins to run upon the occurrence of the act *or the breach* com-

plained of, and not from the time of the damage resulting therefrom." (Citing numerous cases.)

Middlekamp vs. Bessemer Irrigating Ditch Co.,  
103 Pac. Rep., 282.

Now in the case at bar, we submit. that it cannot be gainsaid that if the causes of action have accrued at all, they must have accrued long before the commencement of this action.

The action is brought upon a number of coupons representing installments of the principal and interest accruing upon the respective bonds to which they were originally attached, Each of these coupons contains a flat, independent promise to pay contingent upon the performance of no condition whatever, other than the surrender of the coupon. The form of the installment principal coupon is as follows.

"\$25.00.

Rialto

No. 1.

Irrigation District

will pay

to the bearer at the

Office of the Treasurer of said District at the Town of Rialto, County of San Bernardino, State of California, on Jany. 1st, 1902, on surrender of this coupon the sum of

Twenty-five Dollars,

in U. S. Gold Coin, being 1st installment of Principal on bond of said district. Interest on said installment will cease after maturity.

D. ROBINSON,

Secretary.

No. 426.

Dated Nov. 17, 1890."



The form of interest coupon is as follows:

“\$15.00. Rialto No. 9.

Irrigation District

will pay

to the bearer at the

Office of the Treasurer of said District at the  
Town of Rialto, County of San Bernardino, State  
of California, on July 1st, 1895, on surrender of this  
coupon the sum of

Fifteen Dollars

in U. S. Gold Coin, being semi-annual interest on  
Bond No. 426.

D. ROBINSON,

Secretary.

Dated Nov. 17, 1890.”

All of the coupons are of like tenor and effect, except  
as to the numbers, amounts and dates of maturity.

The bonds were also all of similar tenor and effect  
with the exception of the numbers, each bond being for  
the principal sum of \$500.00, bearing interest at 6% per  
annum, payable semi-annually on the first day of Jan-  
uary and July, and all being dated November 17th,  
1890, the form thereof being as follows:

“Bond No. 426.

United States of America,

\$500.00.

State of California.

\$500.00.

Bond of the

Rialto Irrigation District.

Total issue \$500.000.00.

Located in San Bernardino County, Cal.

For value received, the Rialto Irrigation District,

a public corporation, duly organized and existing under, and pursuant to the laws of the State of California, promises to pay to the bearer hereof, at the office of the treasurer of said district, the sum of (\$500) five hundred dollars in gold coin of the United States, at the dates and upon installments as follows: at the expiration of eleven years from date, five (5) per cent. of said sum; at the expiration of twelve years from date, six (6) per cent. of said sum; at the expiration of thirteen years from date, seven (7) per cent. of said sum; at the expiration of fourteen years from date, eight (8) per cent. of said sum; at the expiration of fifteen years from date, nine (9) per cent. of said sum; at the expiration of sixteen years from date, ten (10) per cent. of said sum; at the expiration of seventeen years from date, eleven (11) per cent. of said sum; at the expiration of eighteen years from date, thirteen (13) per cent. of said sum; at the expiration of nineteen years from date, fifteen (15) per cent. of said sum; at the expiration of the twentieth year from date, a percentage sufficient to pay off said sum in full.

Said installments are to be paid as provided in, and only upon the surrender of the respective installment coupons, hereto attached. And said district promises to pay interest on said principal at the rate of (6) six per cent. per annum, payable in gold coin of the United States at the office of the treasurer of said district semi-annually, on the first day of January and July, of each year upon the surrender of the respective interest coupons hereto attached. Both principal and interest are payable at par.

This bond is one of a series of bonds amounting in the aggregate to five hundred thousand dollars caused to be issued by the board of directors of said Rialto Irrigation District, and pursuant to a vote of the electors of said district at an election held for that purpose on the 15th day of November, 1890. The said series, of which this bond is one, is composed of one thousand bonds, each of the denomination of five hundred dollars, and said bonds are issued by authority of, pursuant to, and after a full compliance with all the requirements of the act of the legislature of the State of California, entitled "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes." Approved March 7, 1887, and the acts amendatory and supplementary thereto.

The Rialto Irrigation District is composed of citrus producing lands divided into ten and twenty acre farms, irrigated by one thousand (1000) inches of water measured under a four-inch pressure, piped to each farm lot. All the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon the real property of the district, which tax is, and the said bonds are, by said act of the legislature made a lien upon all said real property.

In witness whereof, said Rialto Irrigation District has caused these bonds to be issued and signed by its president and secretary, and its corporate seal to be hereunto affixed and the lithographed signature of its secretary to be affixed to each of said

coupons at the office of the board of directors in said district, this 17th day of November, A. D. 1890.

RIALTO IRRIGATION DISTRICT,

By A. B. FOWLER,  
President of said Board.

By D. ROBINSON,

Secretary of said Board.

(Seal of Rialto Irrigation District.)

It cannot be denied that each of these coupons constitutes an independent and distinct obligation and that this is true, regardless of whether or no such coupons are severed from the bond, to which they were originally annexed, and therefore upon the non-payment of the amounts agreed to be paid on the respective dates specified in the coupons, *the right of action immediately became complete*. If this is not true, there is certainly no room for any argument to the effect that it became complete subsequently, for what has happened since the respective maturity dates of these coupons to render these causes of action thereon any more complete than they were upon such maturity dates? We reiterate, that if they did not then become complete, they are not complete now.

In *Clark vs. Iowa City*, 22 L. Ed., (U. S.,) 427, the United States Supreme Court said:

“All statutes of limitation begin to run *when the right of action is complete*, and it would be exceptional and illogical to hold that the statute sleeps with respect to claims upon detached coupons, whilst a complete right of action upon such claims exists in the holder.”

In *Koshkonong vs. Burton*, 26 L. Ed. (U. S.) 886,



where suit was brought on some municipal bonds and attached coupons, the same court said:

*"None of the coupons have ever been detached from the bonds nor paid, except those maturing July 1, 1857, and January 1, 1858. The coupons are all alike except as to dates of maturity. They are complete instruments, capable of sustaining separate actions, without reference to the maturity or ownership of the bonds. \* \* \* \* \**

*This action is barred as to all coupons maturing more than six years before its commencement, whether such coupons were separated or not from the bonds to which they were originally attached. This, upon the authority of Amy vs. Dubuque, 98 (U. S.) 470 (XXV., 228), with the doctrines of which we are entirely satisfied. We there said, construing the statutes of Iowa, upon the subject of limitation, that suits upon unpaid coupons, such as those in suit, might be maintained in advance of the maturity of the principal debt; that 'Upon the non-payment at maturity of each coupon, the holder had a complete cause of action. In other words, he might have instituted his action to recover the amount thereof at their respective maturities. From that date, therefore, the statute commenced to run against them. Upon principle, his failure or neglect to detach the coupon and present it for payment at the time when, by contract, he was entitled to demand payment could not prevent the statute from running.'*"

So also, in Amy vs. Dubuque, 25 L. Ed., (U. S.) 228, the same court said:

*"The case of Clark vs. Iowa City, arose under the same statute of limitations which is invoked by*

the City of Dubuque for its protection in this case. It is cited by counsel for plaintiff in error in support of the proposition that limitation, under the Iowa statute, does not commence to run against a coupon until it is detached from the bond. There are some expressions in the opinion in that case which, standing alone, would seem to sustain that construction of the statute. But it is quite obvious, from the whole opinion, that the conclusion reached, upon the point necessary to be decided, did not rest upon the isolated fact that the coupons sued on had become severed from the bond. It did rest mainly, upon the ground that the coupons sued on were specialties, *separate written contracts, capable of supporting actions after their maturity, without reference to the maturity or ownership of the bonds. We distinctly held in that case, that all statutes of limitation begin to run when the right of action is complete.* We said: "Every consideration, therefore, which gives efficacy to the statute of limitations, when applied to actions on the bonds after their maturity, equally requires that similar limitations should be applied to actions upon the coupons after their maturity.' Our answer to the specific question certified to us was, 'That the Statute of Iowa, which extends the same limitations to actions on all written contracts, sealed or unsealed, began to run against the coupons in suit *from their respective maturities.*' So far, then, from that case supporting the defense of the city, it is an express authority for the position that the limitation of ten years, prescribed by the Iowa statute, applies equally to bonds and their coupons. The only material respect in which this case differs from *Clark vs.*

Iowa City, is that the coupons in suit here have never been severed from the bonds, and are held by the same person who owns the bond, while in that case they were severed from bonds which had been previously paid off. But this difference cannot logically, or in view of the Iowa decisions, affect the construction of the statute under examination. The right of the plaintiff in error to sue upon the coupons *was complete after their non-payment at maturity*, whether they had been previously severed or not from the bond. Upon principle, his failure or neglect to detach the coupon and present it for payment at the time when by contract he was entitled to demand payment, could not prevent the statute from running from that date. Such a construction of the statute would defeat its manifest purpose, which was to prevent the institution of actions founded upon written contracts after the expiration of ten years, without suit, from the time 'their causes accrue;' that is, from the time *the right to sue for a breach attaches.*"

When it is recalled that as we have seen the California Code of Civil Procedure expressly provides that the statute applies to all cases *without exception*, except where the statute otherwise prescribes. (Sec. 312 C. C. P.), of course, it would be peculiarly illogical for the California courts to depart from the rule mentioned in the last three cases we have cited and the California Supreme Court is in accord with the rule and has repeatedly held that the statute applies to *all* actions.

In the case of Collins vs. Driscoll, 69 Cal., 552, the court said:

"The statute of limitations begins to run *when*

*the right of action accrues*, and never before. This is a general rule, and applies to *all* actions.”

In the case of *Jones vs. Nicholl*, 82 Cal., 34, the court said:

“It is also a well-settled rule of law that the statute of limitations begins to run when a right of action accrues. This is a general rule, and applies to *all* actions”

In *Cal. Safe etc. Co. vs. Sierra etc., Co.*, 158 Cal., 690, where bonds and coupons were sued upon, the California Supreme Court said:

“The coupons in question were in the usual form, each consisting of a simple promise to pay to bearer, at a given date and place, the sum of thirty dollars, being six months’ interest on one of the bonds. In the absence of any provision to the contrary in the bonds, or in the instrument securing them, it is undoubtedly the general rule that such coupons are *independent obligations*, and that, at least when they have been detached from the bonds and transferred to others than the holders of the bonds, the statute of limitations begins to run from the time of their maturity. (Short on Law of Railway Bonds, Sec. 75; *Jones on Corporation Bonds and Mortgages*, Sec. 267; *Amy vs. Dubuque*, 98 U. S., 470; *Clark vs. Iowa City*, 20 Wall., 585; *Koshkonong vs. Burton*, 104 U. S., 668; *Nash vs. El Dorado County*, 24 Fed., 252; *Huey vs. Macon Co.*, 35 Fed., 481; *Galveston vs. Loonie*, 54 Tex., 517; *Threadgill vs. Commrs.*, 116 N. C., 616, (21 S. E., 425.)) The appellant claims, however, that a different rule has been established in this State by the decision in *Meyer vs. Porter*, 65 Cal., 67, (2



Pac., 884), and the two companion cases of Roeding vs. Porter, (Cal.) 2 Pac., 888, and Haumeister vs. Porter, (Cal.) 3 Pac., 123, decided in the same month as the Meyer case, and based upon its authority alone. Meyer vs. Porter was an appeal from a judgment denying a writ of mandate to compel the treasurer of the city of Sacramento to pay certain coupons out of funds in his possession. The trial court had sustained a demurrer to the petition of the writ. In the Supreme Court various objections to the granting of the relief sought were considered and overruled. The opinion concludes with these words: "and as the coupons partake of the nature of the bonds to which they belong, and against which the statute of limitations had not run, they were not barred by the statute." There is no further discussion of the point, nor is there, in the report of the case, any showing of the facts upon which the bar of the statute was claimed to have arisen. We are not informed whether the coupons were independent obligations, negotiable, and enforceable, by others than holders of the bonds, nor whether, if so enforceable, a right of action had in fact accrued at such time as to make the bar of the statute applicable. Under these circumstances, we do not regard the isolated expression above quoted as binding this court to the doctrine that an action upon interest coupons is never barred by lapse of time until a right of action on the bond itself would be barred. On the contrary, *we are inclined to take the view* expressed by the United States Circuit Court of Appeals for the ninth circuit in Mather vs. City and County of San Francisco, 115 Fed., 37, 43, (52 C. C. A., 631,

639), where the following language was used in reference to the foregoing statement of this court in *Meyer vs. Porter*: "It is claimed for this utterance of the court that it announces the rule that an action upon coupons is not barred until the statute of limitations has run against the bonds to which they were attached. We do not understand the decision, although it is impossible, from the meagre statement of the case, to determine the precise bearing of the remarks of the court. We are inclined to think that by the use of the language so quoted, it was intended only to affirm the well settled rule that in the application of the statute of limitations the coupon, although it may not be in form the same kind of instrument as the bond to which it belongs, will partake of the contractual nature of the latter, and both will be governed by the same statute of limitations; that is to say, if the bond be a specialty the coupon, which may be a simple promise to pay, will be considered a specialty, and be governed by the statute of limitations applicable to specialties. *City of Lexington vs. Butler*, 14 Wall., 282." Although the distinction between specialties and writings not under seal had been abolished in this State, it is probable that the writer of the opinion in *Meyer vs. Porter* had in mind the rule just referred to. To this extent, it is quite true that "the coupons partake of the nature of the bonds to which they belong," and the question whether an action on the coupons is barred must accordingly be answered by reference to the statute prescribing the period of limitation for an action on the bonds. This was all that was decided in *Lexington vs. Butler*, 14 Wall.,

282, and *City of Kenosha vs. Lamson*, 9 Wall., 483, although the opinions of the Supreme Court of the United States in these cases contained expressions which, taken alone, might have been and, indeed, were by some interpreted to mean that an action on the coupons was not barred until an action on the bonds would be. Such was not, however, the true meaning of the decisions, as is clearly pointed out in *Clark vs. Iowa Cfty*, 20 Wall., 585, and other cases. In view of all this, we think there is nothing in *Meyer vs. Porter* to prevent this court from applying the rule supported by reason, as well as by overwhelming authority, viz.: that, in the absence of some special circumstance to the contrary, the period of limitation of an action on coupons begins to run *from the date of the maturity of the coupons.*"

In Angell on Limitations in section 42, it is said:

"In general, it may be said that it is a rule in courts of equity, as well as in courts of law, that the cause of action or suit arises when and *as soon as the party has a right to apply to the proper tribunals for relief.*"

The Supreme Court of Kansas upholds this elementary doctrine in *McDaniel vs. Cherryvale*, 136 Pac., 899, and says:

"It is settled that *whenever one person may sue another*, a cause of action has accrued, and the statute begins to run. 25 Cyc., 1066."

See also *Griffin vs. Macon Co.*, 36 Fed., 855.

Authorities might be multiplied indefinitely which uphold the legal platitude that the commencement of the running of the statute synchronizes with the accrual

of the cause of action and it is patent that the rule is firmly imbedded in California jurisprudence and we respectfully submit that section 312, C. C. P., cannot be ignored without overturning the ancient and unquestionable doctrine that the transcendent and uncontrollable sovereign power of the legislature cannot be modified, controlled or nullified by the courts.

“The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws.”

1 Blackstone Com., 161.

It is axiomatic that, in the absence of constitutional objection, similar powers are vested in our legislature.

Lukens vs. Npe, 156 Cal., 498.

Notwithstanding it is clear that if the causes of action on the coupons in the case at bar have accrued at all they accrued—in accordance with all the authorities—upon the respective maturity dates of the coupons; notwithstanding the existence of section 312, C. C. P., which by its express terms, admits of no exception applicable here being made to its operation and squarely announces the elementary rule—old as the common law, and consistently upheld by the California courts—that the accrual of the right to sue and the running of the statute go hand in hand; notwithstanding that section 337, C. C. P., in unmistakable language clearly provides that “an action upon any contract, ob-



ligation or liability founded upon an instrument in writing" must be commenced within four years; notwithstanding that it is well settled that the federal courts will follow the decisions of the court of last resort of the State where the controversy arises, in construing the statute of limitations, and notwithstanding that a large number of these coupons matured more than four years before the commencement of this action, in spite of all these features of the case, the learned judge of the District Court rendered judgment in favor of the defendant in error, for the full amount of each and every coupon sued upon herein.

The theory of the learned court appears to have been that the case fell within what is sometimes called the "particular fund doctrine," which has been enunciated in such cases as *Lincoln County vs. Luning*, 33 L. Ed. (U. S.,) 766, and *Robinson vs. Blaine County*, 90 Fed., 63, and that consequently, the statute did not run for the reason that it was admitted that on the first day of January, 1895, and ever since that date the plaintiff in error failed to have sufficient funds with which to pay the coupons in question. (Tr., p. 52.) This leads us to an examination of this doctrine.

### **Particular Fund Doctrine.**

Should we indulge the hypothesis that such a doctrine is ever applicable to a case arising in this State, it is apparent we submit, that it would involve inserting in our statute of limitations an exception to its operation, which exception is not specified therein; in fine, it would be attempting something which we have already

seen, the paramount authority of our legislature and our State Supreme Court say cannot be done. This is obvious because, as our legislature has clearly defined the *accrual of the cause of action* as the commencement of the period within which, *without any exception*, save such as the statute has prescribed, *all* actions must be commenced (sec. 312, C. C. P.,) and as our State Supreme Court has repeatedly reiterated this rule, and held that the statute does apply to *all* actions and that no power is vested in the courts to add exceptions to the statute, it necessarily follows that to say that in certain cases, not within the statutory exceptions, the statute will not run, amounts to nothing less than adding exceptions to the statute and ignoring both the mandate of the legislature and the decisions of our State court, and subverting the rule that the federal courts will be controlled by the State Supreme Court decisions on questions relating to the statute of limitations.

Owing to the plain language of Section 312, C. C. P., our opponent is therefore confronted with two alternatives—either to take the position that the causes of action here have not accrued, and consequently, the statute has not been set in motion, in which event this action was prematurely brought, and hence he cannot recover anything; or on the other hand, to adopt the starting attitude and legal solecism that, although it is idle to deny, he could have sued upon each coupon, as it matured, and hence, the cause of action was complete and *accrued* contemporaneously with such maturity, yet, in defiance of the perspicuous and mandatory terms of sec-

tion 312, he is entitled to divorce the operation of the statute from the accrual of the cause of action, which two things, our legislature and our State Supreme Court unite in declaring inseparable. To choose the latter horn of the dilemma, we submit, would only lead us into an intellectual fog, because it is the equivalent of asserting: (1) that the legislature did not mean to say what it has said in language which could not be plainer, and it also involves complete nullification of section 312 and the decisions of the State courts; (2) that the elementary principle of the concurrence of the running of the statute with the right to sue must be entirely overthrown, and (3) that the well settled doctrine that the federal courts will, on this subject, be guided by the decisions of the local courts is a myth.

To escape from such a palpable *reductio ad absurdum*, the defendant in error endeavored, in the court below, to establish the notion that these coupons were in reality payable *only* and *exclusively* from a particular fund and in his brief filed in that court, he said:—

“Where a county warrant is made payable out of special fund no action *can be maintained until the fund out of which it is payable comes into existence*, and the statute does not begin to run until that time.”

Wetmore vs. Monona County, 73 Iowa, 88, (34 N. W., 751.)

After making this quotation he goes on to say:

“Each of the bonds sued on herein contains a recital to the effect that it is one of a series issued by authority of and pursuant to the requirements of

the Wright Act, (title of the Wright Act being quoted in full in the bond,) and each bond contains a further recital, as follows:

“All the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon the real property of the district, which tax is and the said bonds are by said act of the legislature made a lien upon all of said real property.”

This recital is of particular consequence upon the question of the payment out of a particular fund. The law under which the bonds were issued provides for the levy of an assessment to pay the same, *and the bond itself contains a recital to the effect that it is payable only out of the fund which is to be provided in a particular way for that purpose.* It amounts in effect, if not in terms, to a promise on the part of the district to pay the principal and interest of the bond at the dates therein mentioned, *provided the fund out of which the payment is to be made shall have been collected.*”

(Plaintiff's brief, pages 18-19, filed in District Court.)

In other words, it will be seen from these extracts from his brief, the defendant in error takes the position that the payment of these bonds is *conditioned upon the existence* of the so-called “particular fund” and he plants himself on the doctrine of *Wetmore vs. Monana County* (34 N. W., 751-Ia.) that *no action can be maintained* in the absence of such fund. When it is recalled that it was stipulated no fund has existed since January 1st, 1895, (Tr., p. 53) and hence the proviso and condition, contended for by the defendant in error, has not been complied with, it is difficult to see why defendant



in error, if his theory be correct, has not argued himself out of court. It certainly is apparent that he is insisting upon an absurd legal anomaly to assert in one breath that it is expressly stipulated in these bonds that they are ONLY payable from a certain fund and that the promise of payment contained in the bond is coupled with a proviso which makes payment conditional upon the fund having been first collected, and in the next breath to assert that he is entitled to a money judgment upon the bonds and that he has a complete cause of action, notwithstanding that upon his own admissions, neither the fund exists, nor has such condition precedent been performed.

In *Wetmore vs. Monona Co.*, (Ia.,) 34 N. W., Rep. 751, the court said:

“The warrant was made payable out of a special fund and the defendant *was not liable to action on* the warrant, until the fund out of which it was made payable came into existence.”

In *Travelers Ins. Co. vs. Denver*, 18 Pac., 558, the Supreme Court of Colorado affirmed a judgment sustaining a demurrer in an action brought upon a warrant, payable out of a special fund because the complaint contained no allegation that there was money in such fund and said:

“It seems to be well settled that in an action upon warrants drawn on a special fund, it is necessary for the plaintiff to allege that *there is money in that fund* to pay the same. *Reeve vs. City of Oskkosh*, 33 Wis., 477; *Campbell vs. Polk Co.*, 49 Mo., 214; *Board vs. Mason*, 9 Ind., 97; 1 Dill. Mun.

Corp., Sec. 505; 1 Daniel, Neg. Inst., Sec. 433. The warrants contain a direction to the treasurer of the city to pay 'out of the 20th St. sewer fund', to the order of Joseph Williams, the sums in said warrants named. It is claimed by plaintiff in error that this direction to pay 'out of the 20th St. sewer fund' must be considered as descriptive of the purpose for which the warrants were drawn. We do not think the claim well founded."

In *Forbes v. Board, etc., of Grand County*, 47 Pac. 388, at p. 390, the Supreme Court of Colorado said:

"But no action can rightfully be brought upon such warrant *until the fund is so raised, or the same might have been, by the levy and collection of the tax provided by the revenue law.* *Brewer vs. Otoe Co., supra.* In other words, *no right of action accrues* on such warrant until it is made to appear that one of these conditions exists. Logically, therefore, the statute of limitations does not commence to run *until the happening of such contingency.*"

In the last mentioned case, the court held a demurrer was properly sustained because no cause of action was stated in the absence of any allegation showing existence of funds and the court also clearly upholds the doctrine that the accrual of the cause of action and the operation of the statute are contemporaneous.

In Section 433 of Daniels on Negotiable Instruments, it is said:

"Where a warrant or order is made payable out of a particular fund, it creates no *general* charge against the corporation, but *only against the fund* which is designated."

In Section 51 of Burroughs on Public Securities, it is said:

“When warrants are drawn payable out of a particular fund, they create *no general liability* against the municipality, *upon which an action may be maintained* by the holder. The municipality in such cases is only liable for the proper administration of the fund, and when that is exhausted its liability to a holder ceases.

“In *Kingsbury vs. Pettis County*, the warrant was payable out of ‘the road and canal fund,’ and had ceased to be available for the purposes of discharging the warrants, having been diverted from the county by legislative enactment. It was held that in order to make the county liable it must be shown that the county *had received the fund* and applied it to other uses than called for by the warrant. The diversion of the fund by the legislature created no liability on the general funds of the county.”

In *Argenti vs. City of San Francisco*, 16 Cal., 256, the court says:

“In reference to the warrants, the rights of the plaintiff stand upon a different footing. They are drawn upon a particular fund, and cannot, therefore be regarded either as bills of exchange or promissory notes. The designation of the fund was not intended as a mere direction to the treasurer, and such is not its legal effect. He had no discretion as to the mode or means of payment. He was required to pay from moneys belonging to the fund mentioned in the warrants, and *was not at liberty to resort to any other source for that purpose*.

The effect of the warrants must be controlled by the terms and conditions expressed upon their face, and these are too plain to admit of any doubt as to their construction. The failure to pay them did not alter their nature, or so change their legal effect as to render them the proper subjects of an action. The only remedy was an action upon the the original indebtedness, and in such an action it is possible that the warrants might have been used as evidence for the purpose of establishing the indebtedness. It is clear, however, that *no action can be maintained upon the warrants themselves.*

\* \* \* \* \* The warrants by themselves furnish no ground of recovery. They are neither bills of exchange nor promissory notes; they are drawn against a particular fund, and are not payable absolutely but *only in case the designated fund is sufficient to meet them.*”

In 14 Enc. of Plead. and Practice, at page 531, it is said:

“Where an order is drawn payable out of certain funds to come into the hands of the acceptor, *it must be averred that such funds have come to his hands.*”

See also: Freehill vs. Chamberlain, 65 Cal., 603.

Winston vs. Spokane, 41 Pac. (Wash.), 888.

Faulkner vs. Seattle, 53 Pac. (Wash.), 365.

Dean vs. Walla Walla, 92 Pac. (Wash.), 895.

Brix vs. Catsop, 80 Pac. (Ore.), 650.

Rice vs. Porter, 16 N. J. L., 446.

Rolli vs. Sarell, 16 Eng. Com. Law, 422.

Redman vs. Chacey, 73 N. W., 1081.

Goodrich vs. Detroit, 12 Mich., 279.



Second National Bank of Lansing vs. Lansing,  
25 Mich., 207.

Furthermore, section 15 of the Wright Irrigation Act, (Cal. statutes, 1887, page 36), distinctly provides that bonds issued thereunder "shall be *negotiable in form*," and it is not debatable that no such thing can exist as a negotiable instrument which is payable solely from a particular fund.

In section 3088 of the Civil Code of California, it is provided:

"A negotiable instrument must be made payable in money only and without any condition not certain of fulfillment, except that it may provide for the payment of attorney's fees and costs of suit, in case suit be brought thereon to compel the payment thereof."

In section 107, in Randolph on Commercial Paper, it is said:

"As we have seen, the commercial character of an instrument depends upon its being a contract for unconditional payment. From this follows the rule that *it must not be made payable out of any particular fund*, and if made so payable, its negotiability is destroyed thereby."

In section 50 in Daniel on Negotiable Instruments, it is said:

'In accordance with these principles, the character of the instrument as a bill or note is destroyed if it be made payable expressly or by implication *out of a particular fund*, for its payment becomes then conditioned on the sufficiency of that fund, which may prove inadequate.'

In 4 Am. and Eng. Enc. of Law (2nd Ed.), page 87, it is said:

“Instruments drawn upon a particular fund, whether the fund has already accrued or is to accrue in future, *are not negotiable* bills or notes, since they do not carry the general personal credit of the maker and since they are contingent upon the sufficiency of the fund on which they are drawn.”

If it be true that these bonds do contain the implied proviso, contended for by our opponent, and are payable *only* from a particular fund, it necessarily follows that they are non-negotiable and therefore fail to conform to the mandatory terms of the enabling act under which they purport to have been issued and are thereby rendered void.

In section 42 of the Wright Act, (Cal. Statutes, 1887, p. 44, it is provided that:—

“The board of directors, or other officers of the district, *shall have no power* to incur any debt or liability whatever, either by issuing bonds, or otherwise, *in excess of the express provisions* of this Act, and any debt or liability incurred, in excess of such express provisions, *shall be and remain absolutely void.*”

This last quoted section, we submit, unquestionably makes the provisions of the act concerning the issuance of the bonds, *mandatory*, as it is provided in that section that the consequence of non-compliance with its terms renders the attempted incurring of liability by the irrigation district *absolutely void*, and the section seems

to have been drawn with reference to the well settled distinction between a mandatory and a directory statute.

“A statute is mandatory when non-compliance therewith will render the act done under it *absolutely void*.

“Directory.—If a statute is such that disregard of its provisions will constitute an irregularity, but one not necessarily fatal to acts done or proceedings had thereunder, it is said to be directory.”

26 Am. and Eng Enc. of L., (2nd Ed.,) p. 533.

We respectfully submit that section 42 means just what it says, and that the legislature—well knowing that the class of men who would in all probability, in rural communities, act as directors of irrigation districts, would be men inexperienced in business, legal and financial matters—wisely provided that the powers of irrigation district directors should be confined within specific channels and hedged about with insuperable limitations, thereby preventing such communities from being subjected to stupendous liabilities by reason of ill advised steps of such directors.

“It may be stated generally that where special powers for the accomplishment of a particular purpose are conferred by statute upon corporations or individuals, the acts conferring such powers are to be construed strictly and the powers cannot be exercised for any collateral purpose.”

26 Am. and Eng. Enc. of Law, (2nd Ed.,) p. 665.

See also: *Hughson vs. Crane*, 115 Cal., 404.

*Stimson vs. Allessandro Irrig. Dist.*, 135 Cal., 389.

Sutro vs. Petit, 74 Cal., 332.

Leeman vs. Perris Irrig. Dist., 140 Cal., 540.

In the light of these precedents, and indulging the theory of defendant in error that these bonds are payable only from a particular fund, it is not easy to see how the defendant in error can consistently maintain that he is entitled to any judgment on a single coupon in this case. Nevertheless, in order to find foundation for his argument, that the statute has not been set in motion here, it is essential—unless logic be thrown to the winds and our local statutes of limitation and decisions be also cast into the melting pot—to maintain that his causes of action on these coupons have not accrued, otherwise, he would be confronted with the unavoidable consequences which section 312 of our Code of Civil Procedure so emphatically prescribes shall result *after a cause of action accrues*, and he would then be driven to attempting the impossible. In other words, in such event, he would have then to vindicate his hypothesis of ascribing to causes of action, based on these coupons, the attribute of immortality, by virtually repealing section 312, and by overruling the decisions of our State Supreme Court, and by obliterating the fundamental principle which makes the running of the statute an indispensable accompaniment of the right to sue, unless it is otherwise prescribed by statute.

However, the attitude of defendant in error—in insisting that these coupons are only payable from a special fund and that they import a condition that money shall first be in the fund before the promise to pay becomes



operative—is equally as untenable as would be the other alternative we have mentioned, with which he is faced, and no support for the notion that this case is exempted from the operation of the statute, because the cause of action has not accrued, can be derived from an examination of the bond or coupon.

In the first place, we have seen that each coupon contains a flat promise to pay on surrender of the coupon, and constitutes a *separate and independent cause of action*.

The assertion of defendant in error, that “the bond itself contains a recital to the effect that it is payable *only* out of the fund which is to be provided,” cannot be substantiated. The word “only” does not appear in the recital at all and with that word eliminated there remains no vestige of any color for the theory of our opponent.

The bond does recite (Tr., p. 22,) that:

“All the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon the real property of the district, which tax is, and the said bonds are by said act of the legislature made a lien upon all said real property.”

Furthermore, the Wright Act (Cal. Stat., 1887, p. 36), contains the following provisions:

“Sec. 15       \*       \*       \*       \*       “If a majority of the votes cast are “Bonds—Yes”, the Board of Directors shall immediately cause bonds in said amount to be issued; said bonds shall be payable in gold coin of the United States, in installments as follows, to-wit: At the expiration of

eleven years not less than five per cent of said bonds; at the expiration of twelve years not less than six per cent; at the expiration of thirteen years not less than seven per cent; at the expiration of fourteen years not less than eight per cent; at the expiration of fifteen years not less than nine per cent; at the expiration of sixteen years not less than ten per cent; at the expiration of seventeen years not less than eleven per cent; at the expiration of eighteen years not less than thirteen per cent; at the expiration of nineteen years not less than fifteen per cent and for the twentieth year a percentage sufficient to pay off said bonds; and shall bear interest at the rate of six per cent per annum, payable semi-annually on the first day of January and July of each year. The principal and interest shall be payable at the office of the Treasurer of the district. Said bonds shall be each of the denomination of not less than one hundred dollars, nor more than five hundred dollars, *shall be negotiable* in form, signed by the president and secretary, and the seal of the board of directors shall be affixed thereto. They shall be numbered consecutively as issued, and *bear date at the time of their issue*. Coupons for the interest shall be attached to each bond signed by the secretary. Said bonds shall express on their face that they were issued by authority of this Act, stating its title and date of approval. The secretary shall keep a record of the bonds sold, their number, the date of sale, the price received, and the name of the purchaser.

Sec. 16. The Board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous, to raise money for the

construction of said canals and works, the acquisition of said property and rights and otherwise to fully carry out the objects and purposes of this Act. Before making any sale the Board shall, at a meeting, by resolution, declare its intention to sell a specified amount of the bonds, and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given, by publication thereof at least twenty days, in a daily newspaper published in the cities of San Francisco, Sacramento, and Los Angeles, and in any other newspaper, at their discretion. The notice shall state that sealed proposals will be received by the Board, at their office, for the purchase of the bonds, till the day and hour named in the resolution. At the time appointed the Board shall open the proposals, and award the purchase of the bonds to the highest responsible bidder, and may reject all bids; but said Board shall in no event sell any of the said bonds *for less than ninety per cent* of the face value thereof.

Sec. 17. Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district; and all the real property in the district shall be and remain liable to be assessed for such payments as hereinafter provided.” \* \* \* \*

Sec. 34. Upon the presentation of the coupons due to the treasurer, he shall pay the same *from said Bond Fund*.”

Section 22 of the Wright Act, as amended in 1889, (Cal. Statutes 1889, p. 16) is as follows:

“Section 22. The Board of Directors shall then levy an assessment sufficient to raise the annual in-

terest on the outstanding bonds; and at the expiration of ten years after the issuing of bonds by the Board, must increase said assessment for the ensuing ten years in the following percentage of the principal of the whole amount of bonds then outstanding; to-wit: For the eleventh year, five per cent; for the twelfth year, six per cent; for the thirteenth year, seven per cent; for the fourteenth year, eight per cent; for the fifteenth year, nine per cent; for the sixteenth year, ten per cent; for the seventeenth year, eleven per cent; for the eighteenth year, thirteen per cent; for the nineteenth year, fifteen per cent, and for the twentieth year, a percentage sufficient to pay off said bonds. The secretary of the board must compute and enter in a separate column of the assessment book the respective sums in dollars and cents to be paid as an assessment on the property therein enumerated. When collected the assessment shall be paid into the district treasury, and shall constitute a special fund, to be called the 'Bond Fund of ..... Irrigation District.' In case of the neglect or refusal of the board of directors to cause such assessment and levy to be made, as in this Act provided, then the assessment of property made by the county assessor and the State Board of Equalization shall be adopted and shall be the basis of assessments for the district, and the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment roll for said district to be prepared, and shall make the levy required by this Act in the same manner and with like effect as if the same had been made by said board of directors, and all expenses incident thereto



shall be borne by such district. In case of the neglect or refusal of the collector or treasurer of the district to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated must respectively perform such duties, and shall be accountable therefor upon their official bonds as in other cases."

It is apparent from these quotations that neither the bonds nor the statute contain any language which limits the sources of payment for the bonds or coupons *exclusively* from any particular fund. There is no provision to the effect that these bonds or coupons shall be paid *only* from any special fund. It is true the act provides a special fund shall be raised by assessment which shall constitute a special fund, to be called the "Bond Fund" and *upon the presentation of the coupons due* to the treasurer, he shall pay the same from said Bond Fund. Even if these provisions could be construed as a limitation upon the purposes to which this fund can be devoted, the converse would not be true. There is a manifest distinction between making an obligation payable *only* from a particular fund and making a fund applicable *only* to the payment of such obligation. Because a given fund can be used to pay only certain bonds is no reason for claiming such bonds are payable solely from such fund. (Kimball vs. Commissioners, 21 Fed., 145.)

It is also interesting to note that the Act, approved by the Legislature on March 31st, 1897, covering the government of irrigation districts (Cal. Statutes 1897,

p., 267) omits the provisions of the original Wright Act, which refer to the raising of any special bond fund and the payment of bonds therefrom.

With these principles in mind, the conclusion is unavoidable that the bonds and coupons in question constitute *general* obligations of the irrigation district, and are clearly distinguishable from that class of obligations which are payable *only* from a particular fund and from no other source, upon which latter class, no cause of action for a money judgment can arise until the fund from which they are payable comes into existence. Our conclusion is thoroughly well supported by reason and authority and we submit it is impossible to see how instruments, containing as these do, flat agreements to pay specific sums of money, on certain dates, upon surrender of the coupons, can be distorted into obligations payable *exclusively and only and solely* from a particular fund, simply because it is recited in the bonds that they will be paid by revenue derived from taxation, which is the only source of payment of all municipalities.

The case of Schoenhof vs. Kearney Co., (Kas.,) 92 Pac., 1097, is an instructive case upon this subject. There, the plaintiff sued for interest on bonds evidenced by coupons which were similar in form to the coupons involved here. The defendant pleaded the statute of limitations, to avoid the effect of which the plaintiff showed that no funds had been available for paying the coupons since their maturity and that no levy of any taxes had been made for providing funds. The Supreme Court of Kansas in its opinion, points out that although

the so-called particular fund doctrine has been applied to suits on warrants in Kansas, yet such warrants are merely drafts on anticipated revenue and do not generally mature before the money to meet them is received into the specific fund upon which they are drawn; but coupons are different and “are *general* promises to pay upon a certain day”; hence, *the statute runs from maturity of such coupons*. After distinguishing various cases, cited to support the “particular fund doctrine” and showing the inapplicability of such doctrine to general obligations, such as coupons, the court then disposes of the theory that taxes constitute a particular fund and says:

“Taxes are the primary source of municipal revenue, and money accumulated entirely from taxes with which to meet a general obligation to pay *cannot be said to be a particular fund* in the sense of the decision, nor can it be said that taxation, the chief method of raising municipal revenue, *is a special or particular method*. No other authority cited by the plaintiff supports his argument, and this court is unwilling to extend the exceptional rules relating to the treasury warrants of a municipality to its bonded indebtedness.”

We respectfully submit that, in a state with such statutes of limitations as ours, if the so-called “particular fund doctrine” is to justify any logical or legal distinction between a class of cases in which the plea of the statute of limitations is to be upheld, and another class in which such plea is to be held improper, that doctrine must be held to mean that the obligation, so payable

from the particular fund, is *exclusively* so payable. So construing the doctrine, it becomes perfectly sound and logical, because where the payment is so confined to such fund, a cause of action for a money judgment, on the obligation, will not accrue in the absence of such fund, and hence, the statute will not commence to run. On the other hand, if such payment is merely designated to be made from a fund—either for the convenience of the fiscal management of the municipality, or to comply with some statutory provisions—and the agreement of the municipality to pay is not in express terms *confined to the particular fund*, then such agreement is the equivalent of a *general* promise to pay and the cause of action consequently accrues upon the maturity date of each coupon of such a bond or obligation and the statute concurrently commences to run, in harmony with the provisions of Section 312 of our Code of Civil Procedure and with the decisions of our State Supreme Court, in which case, no elementary and well-settled principles are uprooted, and no legislative enactments are obliterated.

That the Irrigaion District here made no pretense of confining in express terms the payment of these bonds, to any particular fund is absolutely undeniable. If the reference in the bonds to the fact that taxation is the source of revenue, from which the bonds would be paid, could be held to be the equivalent of confining the payment to a particular fund, then every municipal bond in the country would be subject to the particular fund doctrine as, of course, taxation is the universal source from



which all municipalities pay their obligations, and such a decision would constitute a precedent without a precedent. As the Irrigation District failed to expressly restrict the payment of these bonds to any particular fund, it is not permissible to imply such a restriction and thereby convert the primary and general liability of the district into a circumscribed and special liability.

The case of U. S. vs. Clark County, 96 U. S., 211, 24 L. Ed. 628, was a suit upon railway aid bonds issued by the county. By the act authorizing the bonds, a special tax was to be levied for the payment of the bonds. It was contended by the county that the bondholder must look alone to the particular fund provided by the special tax for the payment of the bonds, but the Court said:

“There is no provision in the act that the proceeds of the special tax alone shall be applied to the payment of the bonds. None is expressed, and none, we think, can fairly be implied. It is no uncommon thing in legislation to provide a particular fund as additional security for the payment of a debt. It has often been done by the States, and more than once by the Federal Government. The Act of Congress of February 25, 1862, 12 Stat. at L., 346, set apart the coin paid for duties on imported goods as a special fund for the payment of interest on the public debt and for the purchase of one per centum thereof for a sinking fund; yet no one ever thought the obligation to pay the debt is limited by the amount of the duties collected. Limitations upon a special fund provided to aid in the payment of a debt *are in no sense restrictions of the*

*liability of the debtor.* Why, then, must not the special tax of one twentieth of one per cent. be regarded as merely an additional provision made for the payment of the new debt authorized, rather than as a denial to the creditors of any resort to the ordinary sources from which payment of county debts is to be made? Why should such a provision be construed as placing the holders of the bonds in a worse situation than that of other creditors of the county? These bonds are a debt of the county as fully as is any other liability. Had the act which gave power to the county to issue them said nothing of any special tax, there could be no question that the holders of the bonds, like other creditors, would have a resort to the money in the county treasury collected for the discharge of its obligations; for it is by the law made the duty of the county court to order the payment out of the county treasury of any sum of money found by them to be due from the county. It would, therefore, have been the court's duty to direct its clerk to issue a warrant for payment, as in other cases. And surely it is not to be held, unless such a construction of the statute is absolutely necessary, that when the legislature authorized the county to incur the debt, it intended to deny to the creditor the right to look to the treasury of the county for its payment; in other words, that the debt was sanctioned, but that it was stripped of the usual incidents of a debt, and the debtor was relieved from attendant liabilities. *And it is not to be inferred, from a provision giving the creditor the benefit of a special fund, that it was intended to place him in a worse position than that he would have occupied had*

*no such provision been made.* And that, too, in absence of any direction that he must look exclusively to that fund. Such is not a reasonable construction of the statute."

We submit that the last <sup>quotation</sup>~~question~~ rules the case at bar and clearly shows that when a special fund is to be created by taxation, no restriction is thereby placed upon the liability of the debtor but, on the contrary, the debtor is *generally* liable and the special fund is to be deemed simply an additional security for the payment of the debt. Applying these principles to the bonds and coupons here, how is it possible for an instant to maintain that, when it is said in the bonds that the district "promises to pay to the bearer," a specific sum of money in installments (Tr., p. 7), and when "said installments are to be paid as provided in," the respective coupons (Tr., p. 8), and when it is said in the coupons that the district "will pay to the bearer" a specific sum (Tr., p. 10), that the holder of such coupons or bonds has no right to sue on such bonds or coupons for a money judgment, unless money is in the fund in question? Can it be for a moment denied that credit was given by the bondholder *to the district itself*, when these bonds were issued, and that such bondholder did not accept or contemplate any contingent liability, on the part of the district, dependent upon the presence or absence of cash in the bond fund, or agree to look alone to any fund and not to the district for payment?

"To determine whether the money is payable out of a particular fund, we are to inquire whether the

credit is given to the fund in question, or to the person of the drawer or acceptor of the bill."

Rice vs. Porter's Admrs., 16 N. J. L., page 447.

Referring to negotiable paper, Chancellor Kent, in 3 Kent's Com., p. 76, says:

"It is essential that the bill carry with *it a personal credit*, given to the drawer or indorser, and that it be not confined to credit upon any future or contingent event *or fund*. The payment must not rest upon any contingency, except the failure of the general personal credit of the person drawing or negotiating the instrument."

In Avery vs. Job., 36 Pac., 293 (Ore.), a municipal charter provided that:

"All moneys collected from water rates shall be kept separate from all other funds, and shall be known as the 'water fund, and shall *only* be used to pay the costs incurred by the city in operating such waterworks, and extending and improving the same, and to pay the semi-annual interest on the bonds issued under this act; and all the surplus collected from water rates shall go to create a sinking fund with which to pay the principal of such bonds at maturity."

The Oregon court said:

"The argument is that by this provision of the charter the money collected for water rates is made a special fund for the payment of the interest on the bonds as it accrues, and for the creation of a sinking fund for their payment at maturity, and that it is *the only fund* out of which said bonds, or the interest thereon can be paid. As a general rule, when the legislature authorizes a municipi-



pality to contract a debt, and issue bonds therefor, it is to be inferred that it intended to authorize the payment of such bonds out of the money raised by general taxation, unless there is something in the act itself, or some general limitation upon the power of taxation, which repels such an inference, and, *although a special tax or fund may be provided, the bondholders' remedy is not limited to such tax or fund, unless it is provided that the bonds shall not be paid in any other way.* The bonds, when issued, become a debt of the corporation for which *it is primarily liable*, and for any balance due thereon after the application of the special fund, the holders are entitled to payment out of the general fund of the corporation."

In *Mutual Benefit Ins. Co. vs. City of Elizabeth*, 42 N. J. Law, 235, the syllabus, (paragraph 2) reads:

"A bond given by a city containing a general obligation to pay cannot, except upon the plainest grounds of construction, *be converted in to a promise to pay out of a particular fund.*"

On page 242 of the opinion, the court said:

"Nor do I find in any of the provisions of the laws appertaining to this city, anything from which such a circumscription of this contract can be effected by implication. The law which authorizes the issuing of these instruments contains no intimation that they are not to be instruments imposing a *general* obligation to pay the money mentioned in them. They are the bonds of the city, and such bonds do not have the effect of imposing only a partial obligation. Nor does the fact that the city has a sinking fund devoted specially to the payment of these bonds as they mature, give rise

to such an intendment. Such a contrivance was doubtless designed to put the city in funds to meet these debts as they fell due, *but how such an expectation is to have the effect of converting a general engagement to pay into a particular engagement to pay only out of such fund, is not apparent.* The alteration of the contract from the unrestricted form of its expressed terms to the limited form insisted on, is so material and fundamental, that nothing but the plainest exhibition of a legislative purpose to so circumscribe the operation of these contracts, should be permitted to control them in this particular. If the promise of the city was intended to be a qualified one, it was an easy thing for the legislature to have so declared.

See also *Morrison vs. Bernards*, 36 N. J. Law, 219.

*Commonwealth vs. Select. etc. of Pittsburg*, 88 Pa., 66 at page 83 *et seq.*

*Macon Co. vs. Huidekoper*, 99 U. S., 592, 25 L. Ed., 333 (Note).

*Knox Co. Ct. vs. U. S.*, 109 U. S., 229, 27 L. Ed., 915.

*U. S. vs. Macon Co.*, 99 U. S., 582.

*Backus vs. City of Virginia* (Minn. 1913) 142 N. W., 1042.

*Loan Association vs. Topeka*, 22 L. Ed. (U. S.), 455.

In *United States vs. Scott*, 25 L. Ed. (U. S.), 349, the court said:

“But, in behalf of the city, it is urged that the holder of these bonds must, by the terms of the

statute, and the ordinance of January 22, 1872, look for payment exclusively to assessments upon the property specially improved and benefited. It is contended that such was the purpose of the city, of which the purchaser had constructive notice in the reference, in the marginal statement upon the bonds, both to sections 16 and 17 of the Act of March 2, 1871, and to the ordinance passed by the council. To that interpretation of the contract we cannot yield our assent. It is true that section 17 declares that 'For the payment of said bonds' assessments shall be made 'Upon the taxable property chargeable therewith;' that is, 'on all lots and pieces of ground to the center of the block, extending along the street or avenue, and distance improved.' *But it is neither expressly nor by necessary implication provided that the holder of the bonds may not be paid in some other mode, or that the city will not, under the authority derived from other sections of the statute, comply with its promise to pay the bonds, with interest, at maturity.'*

In *Vickey vs. Sioux City*, 115 Fed., 440, the circumstances were very similar to the case at bar, only in the former case, it seems to have been provided that the special fund should be used *only* for the payment of certain bonds, which is not the case here. We have already pointed out the conspicuous distinction existing between an obligation which is payable *only* from a special fund and a special fund which can be used *only* for paying a certain obligation—the former arrangement causing the obligation to fall within the special fund doctrine and thereby rendering the existence of the fund a *sine qua non* be-

fore a cause of action for a money judgment on the instrument can arise, and also necessarily resulting in the statute of limitations being held in abeyance until such fund is provided; while, on the other hand, where the instruments are *general* obligations and the act simply provides that the fund in question shall be used solely for paying such obligations, an entirely different state of affairs exists and the cause of action accrues upon maturity of the obligation. In the *Vickey* case, the court said:

“There is not to be found, either in the Act of the 20th General Assembly, or in the ordinance of the city based thereon, or in the terms of the bonds, any declaration to the effect that the bondholder can look *only* to the fund realized from the special assessment for the payment of the bonds, and *the express promise to pay*, on the part of the city, which is set forth in the bond, *cannot be limited* by the inferences sought to be drawn from the fact that the act of the legislature provided for the creation of a sinking fund, consisting of the funds derived from special assessment, to be used *only* for the payment of the cost of the improvements, including the bonds issued to meet the cost.”

In *U. S. vs. Saunders*, 124 Fed. Reps., 131, it is said in the syllabus:

“District bonds of a city, issued to pay for internal improvements, which contain no stipulation limiting the recourse of their holders to the special taxes levied for such improvements create a *general* liability of the city issuing them, and their officers are authorized and required to levy and collect taxes



upon all the taxable property within the limits of the city.”

See also *State vs. Commissioners*, 37 Ohio St., 526.

*Wyandotte vs. Zeilz*, 21 Kan., 467.

*Hitchcock vs. Galveston*, 96 U. S., 341, 24 L. Ed., 659.

*Kimball vs. Board of Commissioners*, 21 Fed., 145.

*Eaton vs. Mimnaugh*, 73 Pac., (Ore.,) 754.

In the case of *Kimball vs. Board of Commissioners*, 21 Fed., 145, the Court said:

“It cannot be said to be true in fact that the bonds are payable solely from the proceeds of the special assessments, unless an inference to that effect must be drawn from the requirement that the assessment be made, and that the money derived therefrom shall be applied to no other purpose. But this inference, as it seems to me, in the light of the whole statute, is neither necessary nor admissible. While the special fund is provided, which may be used for no other purpose, *it is not declared that no other fund may not be used for the same purpose.*”

See also *Brokenbraugh vs. Board, etc., of Charlotte*, (N. C.,) 46 S. E. 28-30.

*State vs. Mayor, etc., Neosho*, (Mo.,) 101 S. W. 99-110.

*City of Springfield vs. Edwards*, 84 Ill., 626-633.

*Swanson vs. City of Ottumwa*, (Ia.,) 91 N. W., 1048.

*Fowler vs. City of Superior*, 54 N. W., 800-803.

Olmstead vs. City of Superior, 155 Fed., 172-179.

Note 37 L. R. A., (N. S.,) 1070.

In Herring vs. Modesto Irr. Dist., 95 Fed., 705-709, (an action upon coupons attached to bonds of an irrigation district, which action was brought in the United States Circuit Court of California) the Court said:

“The action is at law to recover a money judgment on each of the coupons mentioned in the complaint, that has become due and payable under the provisions of the statute and the terms of the contract contained in the bonds. The fact that these coupons are to be paid out of a fund to be raised by the officers of the district in a specified manner does not impose upon the plaintiff the necessity of alleging that these officers have failed to perform their duty. The suit is not upon an order or warrant issued by a municipal officer, but upon a *corporate promise to pay*, with respect to which there has been a default. In *Travelers' Ins. Co., vs. City of Denver* (Colo., Sup.,) 18 Pac. 556, 558; *Reeve vs. City of Oshkosh*, 33 Wis., 477; *Campbell vs. Polk Co.*, 49 Mo., 214; *Board vs. Mason*, 9 Ind., 97; *Cloud vs. Town of Sumas*, (Wash.,) 37 Pac., 305; *Aylesworth, vs. Gratiot Co.*, 43 Fed., 350, the actions were all founded upon the failure of a municipal officer to pay an order or warrant drawn by another officer of the corporation. *The present cause of action is based upon the failure of the defendant to pay a certain sum of money at a time and place specified in its contract. For this default the plaintiff is entitled to maintain this ac-*

*tion. And it is immaterial, in determining the sufficiency of the complaint, to consider how the judgment in the suit may be enforced."*

From the foregoing cases it clearly appears that neither the bonds nor coupons in the case at bar are payable *solely* from any particular fund, but constitute *general* obligations of the district which may be sued upon *as soon as they severally mature*. This being the case, with the imperative terms of Section 312 of our Code of Civil Procedure before us, fortified by the elementary rule that the courts cannot add exceptions omitted by the legislature, and buttressed by numerous decisions of our State Supreme Court holding that our statute of limitations applies *to all cases without any exception unspecified by the legislature*, it is very plain we respectfully submit, that the statute of limitations has run against all of these coupons which matured four years or more before the commencement of this action. The only escape from such a conclusion would be to show that Section 312 of the Code is not operative, upon the theory that the causes of action *have not accrued* on these simple and unreserved promises to pay specific sums at precise dates upon surrender of the coupons, notwithstanding the admitted breach of each of such promises. The fallacy of considering such a theory being of any assistance to the defendant in error arises from the fact that it can only be supported by reasoning *telo de se* in character, which reasoning necessarily embraces the preposterous notions (a) that, notwithstanding the decisions to the contrary, these coupons are payable *exclusively* from a particular fund and fix no gen-

eral liability on the district; (b) that the language of these coupons is tantamount to the incorporation of an express proviso in the coupons to the effect that they are payable from *no other source* or fund, and (c) that as there is no money in the fund no cause of action for a money judgment has yet accrued and consequently, Sec. 312 is inapplicable.

We reiterate, if it be true that the cause of action has not accrued, why is defendant in error here?

Whatever reply he may make to this query, it still remains true that with the exception of this decision of the District Court, brought now to this court for review, not a single solitary decision can be found—where the statute of limitations was pleaded in an action on bonds of this character, in a jurisdiction with a statute of limitations similar to section 312, C. C. P., and which statute has been brought to the attention of the court—which upholds the novel doctrine that the statute is not a complete defense to such instruments which have matured four years before the commencement of the action. It is true we may be unable at present to cite any decision of our State Supreme Court on this subject where irrigation district bonds were involved, but we shall be able to cite precedents of that court, involving bonds of other public corporations of practically identical import as the bonds here. It may also be of interest to note that Judge B. F. Bledsoe (now one of the judges of the U. S. District Court for the southern division of California), while judge of the San Bernardino County Superior Court, in the case of *A. M. Ham vs. Grapeland*



Irrigation District, recently held that the statute does run against irrigation district bonds. Judge F. F. Oster, of the same Superior Court, lately announced the same doctrine, while trying the case of Arthur Young vs. Allesandro Irrigation District in the Superior Court of Riverside County, California, and Judge F. E. Densmore of the Riverside County Superior Court, likewise so held in the case of James Patterson vs. Perris Irrigation District. The Ham case was not appealed by the plaintiff therein; the Young case was settled for a very small consideration, and the Patterson case was also not appealed by the plaintiff therein.

The far sweeping reach of this decision of the District Court arises from the fact that bonds of irrigation districts, all over Southern California, and from Fresno to San Diego, have been issued in stupendous amounts. These numerous districts have all proved dismal failures, the financial history of which districts is a matter of which the courts will take judicial notice.

Hughson vs. Crane, 115 Cal., 404.

When it is recalled that many years ago the country was and still is flooded with such paper, and that the principal sums and accumulated interest, evidenced by such paper now extant, run up into many millions of dollars; that nearly all of such issues of bonds were acquired by the present holders or their predecessors in interest, at a tremendous discount for purposes of speculation; that such holders, after a period of slumbrous tranquility; during which it generally transpires, more than twenty years have elapsed, as most of these bond issues

were made shortly after the enactment of the Wright Act in 1887—come forward and assert their belated claims to the full limit of principal and accumulated interest, because “it is denominated in the bond,” regardless of the fact that the paper was acquired by them for a few cents upon the dollar; that such claims will be charged against a vast acreage embraced within numerous irrigation districts, situate all over this State, the present land owners of which districts, it is proposed shall be held responsible for the mistakes and negligence of men—generally untrained in business affairs—who have long since ceased to hold office in such districts, and who, from lack of knowledge of the law, permitted such bonds to be issued; that such land owners will often find themselves without available defense to meet the legal presumptions of the legality of such bonds, because, owing to the great lapse of time, witnesses to the facts, constituting the infirmities of the paper, have long since scattered or died; that during the many years holders of such bonds have refrained from pressing their claims, valuable property rights have been acquired by numerous land owners, and vast expenditures made in the districts, under the general impression, prevailing in southern California, that such bonds were non-enforceable, and by the long inaction of such bondholders, scores of investors in lands within the zones affected by such bonds, have been lulled into the belief that such stale claims never would be pressed; such conditions, certainly, we submit, make the question one of most vital and far reaching importance.

The multitude of settlers in these districts, who have "borne the heat and the burden of the day," if this decision stands, will now be confronted with an enormous indebtedness respecting which nearly all of them had nothing to do. Before this burden should be fastened upon the generation which has grown up since these bonds were issued; before the homes of many of these people are practically ruined by the blighting effect of imposing thereon a bonded debt, now here claimed to be immortal, but long since supposed by the public in these districts, to have fallen into a state of "innocuous desuetude;" before the countless bonds of other irrigation districts—which bonds have in times past been purchased by speculators for a song and have lain unenforced for a long period of years because their owners deemed them unenforceable—emerge from their dusty receptacles and are sued upon with accumulated interest; before such things happen upon the strength of this decision of the District Court, we respectfully submit (1) that the language of Section 312, C. C. P., should be entitled to the weight which arises from such plain and unmistakable words; (2) that the heretofore unquestioned construction placed by our State Supreme Court on the statute of limitations should be followed by this court in accordance with the rule of the federal courts; (3) that there is nothing in the case at bar which justifies the anomalous doctrine that the right to sue for a money judgment herein became complete long years ago without at the same time starting the running of the statute, which novel reasoning can lead nowhere but

into a mental *cul de sac* and obviously results in the stultification of all logical principles enunciated so repeatedly by the courts when discussing the statute of limitations.

The situation here is somewhat akin to that presented in *S. F. Savings Union vs. Reclamation District*, 144 Cal., 649, where, in referring to the proper construction to be placed upon a statute, the California Supreme Court said:

“It would be an impossible construction of the amendment of 1899 to hold that it not only gives the right to maintain an action against the district upon these stale claims, but also revives the right to maintain the suit for a writ of mandate to compel an assessment which had been previously barred by the statute of limitations. Such a construction could never be based upon implication merely, but would require express and distinct words to that effect. It must be presumed that if the legislature had intended such results it would have expressed its meaning in terms fitly appropriate to describe a proposition so remarkable and unusual. Moreover, such construction would undoubtedly be productive of injustice and oppression. *For many years these claims had been considered as outlawed. The owners of land within the district have no doubt considered their property free from any liability on account of the burden of these debts. During this period numerous transactions must have been made upon the belief that no such burden existed. There is nothing to indicate that the legislature intended to re-establish this burden and thus disturb long-settled conditions.*”



So also this court in the case of Eddy vs. San Francisco, 162 Fed., 441, adopted views similar to the State Supreme Court, in a suit brought on stale claims founded on bonds, and referring to whether equitable relief was applicable, said:

“It involves also the question of change of situation which occurring during neglectful repose may render relief inequitable. The real parties in interest here, the parties to be affected by the relief which is sought, are the owners of the land included in the district made taxable by the improvement. In the years that have passed since the maturity of the bonds and coupons, it is reasonable to assume that a very considerable portion of that land may have been conveyed or encumbered and that extensive improvements may have been made thereon.”

Why should it be deemed expedient or right that those, who like this defendant in error, have remained supine all these years, should be now hedged about and protected from the operation of the statute of limitations and the court be expected to create a palpable legal anomaly on their behalf, by doing violence to the express language of the statute, in admitting the accrual of the cause of action and yet holding that the statute has not run?

To ask the court to so hold is simply indulging fantastic theories of the kind mentioned in the case of Campbell vs. Haverhill, 39 L. Ed., (U. S.) 280, where the court was also in effect requested to consider that the plaintiffs belonged to a privileged class and where the United States Supreme Court said:

“Unless this be the law, we have the anomaly of a distinct class of actions *subject to no limitation whatever*; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions. The result is that users of patented articles, perhaps innocent of any wrong intention, may be fretted by actions brought against them after all their witnesses are dead, and perhaps after all memory of the transaction is lost to them. This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in *Adams vs. Woods*, 6 U. S., 2 Cranch, 336, 342, (2; 298, 299,) of a similar statute: ‘This would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.’

Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court, that they are to be treated as statutes of repose, and *are not to be construed so as to defeat their obvious intent* to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired. As was said of the statute of limitations by Mr. Justice Story (*Bell vs. Morrison*, 26 U. S., 1 Pet. 351, 360 (7; 174, 178.)) ‘It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security from stale demands, af-

ter the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of the witnesses.' ''

Since the plaintiffs here as well as other similar creditors, have long delayed to press their claims, and valuable property rights have been acquired by others within the district of the defendant corporation, upon the supposition that the bonds here sued on were invalid, and that the holders thereof were thus treating them as invalid, it works no injustice upon plaintiffs to here hold that their claims are barred by the statute. They alone are to blame that the general impression prevailed in Southern California that no effort would be made to enforce payment of the bonds and their coupons, and that such bonds and coupons were *uncollectible* and non-enforceable. They alone are to blame for lulling purchasers of real property within the district into a belief of perfect security from such claims as are here pressed.

The old doctrine that the statute of limitations was founded upon the theory that lapse of time presumed payment has long since been exploded, and the courts in line with the case last cited now openly and generally announce that statutes of limitations are statutes of repose, based upon sound public policy and are to be favored.

In *Nichols vs. Randall*, 136 Cal., 432, the Court there says:

“Statutes of limitation have become rules of property. They are vital to the welfare of society and are favored in law. They are found and approved in all systems of enlightened jurisprudence; they

promote repose by giving security and stability to human affairs; important public policy lies at their foundation; they stimulate to activity and prevent negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary."

"Wood vs. Carpenter, 101 U. S., 135, 139;  
Shain vs. Sresovich, 104 Cal., 406."

If the "particular fund doctrine" could be held applicable here, it would be equally appropriate to apply it to every municipal bond issued and thereby deprive all municipalities of the plea of the statute of limitations, because as was said by the Supreme Court of Illinois in *People vs. Scoon*, 97 N. E., 310, "All bonds of municipalities are in effect payable out of a special fund."

In this connection, we invite the attention of the court to the fact that in California, it seems to have been almost the uniform practice of the legislature to provide a fund—equally as much a particular fund as that mentioned in the Wright Irrigation Act—for the payment of bonds, as will be seen from a scrutiny of the following statutes:

Statutes of California, 1861, p. 242 (S. F. School Bonds).

Statutes of California, 1863, p. 583, Secs. 6 and 7 (Asylum bonds).

Statutes of California, 1889, p. 361, section 6. (Parks and Boulevard bonds.)

Statutes of California, 1891, p. 30, section 22. (Levee District bonds.)



- Statutes of California, 1891, p. 223, section 13.  
(Sanitary District bonds).
- Statutes of California, 1891, p. 110, section 5.  
(S. F. Depot bonds.)
- Statutes of California, 1907, p. 772, section 5.  
(S. F. Sea Wall bonds,)
- Statutes of California, 1907, p. 781, section 5.  
(S. F. Harbor bonds.)
- Statutes of California, 1913, p. 1122, section 5.  
(S. F. Sea Wall bonds.)
- Statutes of California, 1913, p. 815, section 21.  
(Water District bonds.)
- Statutes of California, 1891, p. 116, section 38.  
(Street Imp. bonds.)

In the last statute cited above, the legislature especially confined the remedy of the bondholder (by statute and recital in the bond) to the particular fund and stated that the municipality was not liable thereon. This would seem to indicate that the legislature understood the distinction between a *general* and *special* obligation, and that when the latter was the kind contemplated, it expressly provided that the bondholder could look to *no other fund for payment*.

The bond statutes we have mentioned, are only a few of the numerous statutes enacted by the California legislature, which provide for the creation of a fund with which to pay the bonds authorized to be issued in the premises, and yet if the so-called "particular fund doctrine" is to be considered controlling in this case, thereby working a stultification of the ordinary, well-settled

effect of the statute of limitations, where is any limit to be fixed to such deprivation of the right of the municipality to avail itself of a defense specifically provided by law? Even the California legislature is prohibited by the State constitution from enacting any special law upon the subject of the limitation of actions (Subd. of section 25 of article IV of California Constitution) and yet, to sustain the contention of the defendant in error and hold that the statute shall not run, where an irrigation district is concerned, would be, we respectfully submit, essaying to do something which in its results, is tantamount to invading a domain from which the law making power itself is excluded by that constitution.

All the courts, both Federal and State, have been open to the defendant in error during the many years that have elapsed since the respective maturity dates of these coupons and there exists no reason or justification whatever for his long continued delay in instituting this action for a judgment on these coupons. Furthermore, the Wright Act provides a method of which a bondholder can avail himself should the officers of the district fail to raise sufficient funds to meet the payments falling due on the coupons, and section 22 of the act (Cal. Stat. 1889, p. 16), says:

“In case of the neglect or refusal of the board of directors to cause such assessment and levy to be made, as in this act provided, then the assessment of property made by the county assessor and the State Board of Equalization shall be adopted and shall be the basis of assessments for the district, and the board of supervisors of the county in which

the office of the board of directors is situated shall cause an assessment roll for said district to be prepared, and shall make the levy required by this act in the same manner and with like effect as if the same had been made by said board of directors, and all expenses incident thereto shall be borne by such district. In case of the neglect or refusal of the collector or treasurer of the district to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated, must respectively perform such duties, and shall be accountable therefor upon their official bonds as in other cases.”

Without taking advantage of this alternative method by applying to the county supervisors or county tax collector for relief; without demanding of the officers of the irrigation district that any tax should be levied or fund provided, without even presenting a single coupon to the treasurer of the district and demanding payment, the defendant in error remained quiescent throughout a period of years and neglected to utilize the opportunities afforded by the courts and the statute to enforce payment of these coupons, until a large number of the coupons had matured far more than four years before the date of the commencement of this action.

### **Cases Appearing to Support Particular Fund Doctrine Are Inapplicable Here.**

Lincoln County vs. Luning.

One of the cases relied upon by the defendant in error in the court below was that of Lincoln County vs.

Luning, 33 L. Ed., (U. S.) 766, which was decided by the United States Supreme Court in the year 1890. That was an action on bonds and coupons of Lincoln County, Nevada, which seems to have been misunderstood by our opponent.

By reference to the case of Davis vs. Board, etc., vs. Lincoln Co. 45 Pac., 982 (which was also a suit on some of the same issue of Lincoln County Bonds), it will be seen that the act of 1873, authorizing these bonds, provided for a *special tax* to be levied annually and placed in a fund to be used *only* for the payment of the interest. It is evident from the case, that if the act of 1873 had been all that had been done relative to these bonds, the statute of limitations would have been applicable. This conclusion is fortified from the very fact that the legislature thought it necessary to pass a special act (1877) providing that if there were not funds to pay the interest on these bonds, the bondholder might present them and have the certificate of presentation endorsed thereon, after which the coupons would be payable in the order of presentation.

Upon this subject, the U. S. Supreme Court said:

“The remaining question arises on the statute of limitations. By the general limitation law of the State some of the coupons were barred; *but there has been this special legislation in reference to these coupons.* The bonds were issued under the Funding Act of 1873. In 1877 the county was delinquent in its interest, and the legislature passed an act amendatory to the act of 1873. This amendatory act provided for the registering of overdue



coupons, and imposed upon the treasurer the *duty of thereafter paying the coupons as money came into his possession* applicable thereto, in the order of their registration. Statutes of Nevada 1877, 46.

The coupons which by the general limitation law would have been barred were presented, as they fell due, to the treasurer for payment, and payment demanded and refused, because the interest fund was exhausted. Thereupon the treasurer registered them as presented, in accordance with the act of 1877, and from the time of their registration to the commencement of this suit there was no money in the treasury applicable to their payment. This act, providing for registration and for payment in a particular order, *was a new provision for the payment of these bonds, which was accepted by the creditor, and created a new right upon which he might rely.* It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to to pay such coupons as were registered, in the order of their registration, *as fast as money came into the interest fund*; and such promise was by the creditor accepted; and when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided.

The cases of Underhill vs. Sonora, 17 Cal., 172, and Freehill vs. Chamberlain, 65 Cal., 603, are in point. In the former case the court observes that "the legislative acts then *recognized the debt* and

made provision for its payment. This is enough to withdraw the case from the operation of the statute; it is equivalent to a trust deed by the State setting apart property out of which the money due was to be paid at a given time, if not sooner paid upon a claim acknowledged to be an outstanding debt; and we cannot conceive of any principle of law or justice which would hold the claim to be barred by the statute simply because the creditor waited after this for his money." In the other case it was held that "where a statute provides for the issuing of bonds of a city with interest coupons payable as fast as money should come into the treasury from special sources designated by the act, the statute of limitations does not commence to run against the coupons until the money is received in the treasury in accordance with the terms of the act."

33 L. Ed. pgs. 767-768.

Where in the case at bar, is any similarity to the Luning case? It is very clear that in the latter case, the court planted its decision on the fact that, subsequent to the original act, under which the bonds were issued, a special act was passed, which the court held was a *recognition* of the debt and that the new provisions of the subsequent act, providing for registration etc., imposed the duty on the treasurer of "paying the coupons as money came into his possession."

This subsequent act, the Court says, "created a *new right*" and amounted to a promise to pay the coupons "as fast as money came into the interest fund." In fine, the court simply holds that the act of 1877 *extended the time for paying the coupons*.

This is also shown by the case of Davis vs. Lincoln County, (Nev.) 45 Pac., 982, which was decided after the Luning case, where the Nevada Supreme Court squarely holds that the Act of 1877 was the equivalent of an agreement for *an extension of time* for payment of the debt and says:

“By the act of 1877 they were to be paid as fast as the annual levy of 45 cents on each \$100 of property in the county would produce sufficient money therefor. How soon that would be, would, of course, depend upon the amount of property in the county, and the amount of coupons that might be presented under the act, and the order of their presentation. They might be paid in one year, and they might not all be paid in twenty years. *The creditor accepted this proposition when he presented his coupons* and had their presentation certified by the treasurer. *This was in the nature of an agreement for an extension of time for their payment. The creditor agreed to wait, no matter how long it might take, for payment under that arrangement and he has waited accordingly.* As long as the tax was being levied and collected, there was no occasion for him to bring an action, and, if he had, *it seems very probable it could not have been maintained had the proper defense been made.*”

It is obvious that without the subsequent Act of 1877 an entirely different status would have existed and *that act alone* is made the foundation of both the decision of the Federal Supreme Court and the Nevada Court.

In the case at bar, there is no pretense of any statutory extension of time or subsequent act providing for registration of coupons or covering anything else con-

nected with the subject, and where, as we have seen, by express statute of this state it is provided that *there can be no exception*, unspecified by the legislature, made to the statute of limitations, it is futile to argue that the Luning case is applicable here.

In determining the correct interpretation of the Lincoln County vs. Luning decision, the reference to the case, by Abbott in his excellent new work on Municipal Securities, at page 408, is helpful:

“An Act of the Legislature, (1877), providing for the registration of overdue coupons of a county and requiring the county treasurer to pay them thereafter from designated funds, will be regarded as a new provision for their payment, *which saves the right of action thereon from the statute of limitations.*”

It will also be noted that in the Luning case, the Court refers to the cases of Underhill vs. Sonora, 17 Cal., 172, and Freehill vs. Chamberlain, 65 Cal., 603, as furnishing support to the decision, but a careful examination of those two California cases shows that they cannot rule the case at bar, as the facts in those cases were widely divergent from the situation here.

Upon this subject, in the case of Schoenhoeft vs. Kearny County, 92 Pac., 1097, where a money judgment was sought on unpaid coupons, the Supreme Court of Kansas held that the statute of limitations had run against the coupons, although no funds had been provided by the county. From some decisions, it appears that warrants have been favorite instruments with the courts to which to apply the particular fund



doctrine, (Herring vs. Modesto Irr. Dist. 95 Fed., 705,) and the Kansas court dwells upon the distinction existing between bonds and warrants and we particularly draw the attention of the Court to the remarks, made by the Kansas Court, with reference to the Luning case and the California cases mentioned in the Luning decision. The Kansas Court says:

“Although warrants may take the form of negotiable paper, and be made payable at a specific date, they are not negotiable in a commercial sense, belong in a class by themselves, and *are fundamentally different* from the ordinary municipal bonds and coupons representing installments of interest upon such bonds. This is made clear by the general law relating to the issuing, registration, and order of payment of municipal warrants. All warrants must specify out of what fund they are payable and the nature of the claim or service for which they are issued. The clerk and treasurer of the municipality both make a record of them before delivery. It is the treasurer’s duty to pay them on presentation, provided, however, he has sufficient money in the fund on which they are drawn to do so. If the treasurer cannot pay on presentation, he stamps them, “Presented and not paid for want of funds,” and registers them. Thereafter, they are to be paid in order of registration, and, as the funds come in, the treasurer sets apart a sufficient sum to take them up. At stated times the treasurer publishes a call for the redemption of as many warrants as he can pay, and interest upon them ceases after publication of the call. (Gen. St. 1901, c. 87.) Under this statute, warrants are

*simply drafts on anticipated revenue* (City of Burton vs. Savings Bank, 28 Kan., 390; School District vs. Bank, 63 Kan., 668; 66 Pac., 630), which, whatever the form or expressed date of maturity, are not in law or in fact payable, except as from time to time money to meet them is received into the specific fund of the treasury upon which they are drawn. A judgment upon a warrant merely establishes the claim against the municipality, and it is still payable only in the order of its registration from the fund designated for the purpose. Obligations of the character of those in suit are *general promises to pay at all events upon a certain day*. True, a fund must be created by taxation to meet coupons representing the interest upon bonded indebtedness, but no particular fund is, at the time of their issue, expressly pledged in advance to their payment, and, *whether or not money has been raised to meet them, they are due and payable absolutely* upon the stated days of their maturity. Perhaps under exceptional circumstances warrants may sometimes become payable when funds to meet them ought to be in the treasury, but ordinarily it is *the condition of the public treasury which matures them*. Unless the circumstances be decidedly exceptional, *bonds and their attendant coupons mature according to contract*.

“The foregoing being true, it may properly be said that the legislature intended the statute of limitations should be regarded as commencing to run upon a warrant from the time funds are in the treasury, and not from the date of the instrument, or from the nominal date of maturity expressed on its face. In any event, a municipality with power

to provide the funds necessary to mature its outstanding warrants should not be allowed to assert its own neglect to take steps to that end for the purpose of raising the bar of the statute. But, since all the reasons upon which such conclusions are based, fall in respect to ordinary negotiable bonds and coupons, they must be left to be governed by the law applicable to instruments of the class to which they belong. The plaintiff's argument presumes largely upon general statements made in decisions referring to particular obligations governed by particular statutes. Thus the language of this court in the opinion in the case of *Hubbell vs. South Hutchinson*, 64 Kan., 645, 68 Pac., 52, is quoted as if decisive of this one. It was there said: 'This action was based upon certain written obligations, and, in the absence of intervening circumstances, would become barred within five years from the date of their issuance. It is the settled law of this State, however, that the statute of limitations does not run in favor of a municipal or quasi municipal corporation upon its outstanding obligations until the corporation has provided a fund with which payment thereof may be made. (*School District vs. Bank*, 63 Kan., 668; 66 Pac., 630), and cases there cited; *Miller vs. Haskell County* (Kan.), 66 Pac., 1084. The syllabus of the case, the authorities cited, and the context show that the court had in mind nothing but the specific class of instruments it was then considering, viz; municipal warrants. It was not the purpose to settle (or, more accurately stated, to overturn), the law relating to the limitation of actions upon ordinary municipal bonds.

The plaintiff maintains that, according to a cer-

tain line of decisions, when municipal bonds are payable out of a fund which the debtor must provide by a levy of taxes, it is estopped to plead the statute of limitations until that duty has been performed, and funds for payment have been provided by that method. It is claimed the decision in the case of *Underhill vs. City of Sonora*, 17 Cal., 172, is to that effect. The court announced *no such principle in that case*. The ground of the decision is apparent from the second paragraph of the syllabus, which reads: 'Bonds of the City of Sonora, dated March 25, 1853, and falling due in two years, are sued on April 5, 1860. March 9, 1855, an act of the Legislature was passed, re-incorporating the city, and providing that, 'In case the public debt is not liquidated at the expiration of three years, the trustees shall have power to levy a sufficient tax, in addition to the one per cent. authorized in another section for general purposes of revenue, to pay the outstanding debt.' March 29, 1858, another similar act was passed, the time mentioned being six, instead of three, years. These acts were passed at the instance of the corporators. Held, that these acts *recognize the city debt*, and provide for its payment; and *hence withdraw the bonds from the statute of limitations*.'" The opinion is equally clear. An abstract from it is quoted in *School District vs. Bank*, 63 Kan., 668, 671, 66 Pac., 630. The decision in the case of *Freehill vs. Chamberlain*, 65 Cal., 603, 4 Pac., 646, is cited. It is only necessary to quote the syllabus to show that the coupons there in suit were, by the statute authorizing their issue, *in effect placed in the same category as warrants in this State*. It reads: "Where a statute



provides for the issuing of bonds of a city, with interest coupons payable as fast as money should come into the treasury from special sources designated by the act, the statute of limitations does not commence to run against the coupons until the money is received in the treasury in accordance with the terms of the act. The interest coupons upon bonds of the City of Sacramento, issued under the act of April 24, 1858, are not demands which are required to be presented for allowance to the auditor or board of trustees. They are payable on presentation to the treasurer, whenever there are funds in his possession which have been appropriated to the payment of the coupons (by the act authorizing the bonds.) The case of *Lincoln County vs. Luning*, 133 U. S., 529, 10 Sup. Ct. 363, 33 L. Ed., 766, is relied upon. The coupons there involved *were virtually converted into treasury warrants* by an act of the Legislature passed after they were issued and accepted by the creditor. An extract from the opinion by Mr. Justice Brewer is quoted in *School District vs. Bank*, 63 Kan., 668, 671, 66 Pac., 630. The case of *Sawyer vs. Colgan*, 102 Cal., 292, 36 Pac., 580, is also referred to. The bonds there under consideration were state bonds issued under a special act for a special purpose. It was expected that Congress would provide funds to pay them. If it did not do so, the intention of the Legislature, as expressed in the act, was that they should be payable out of money which should be found in the State treasury at their maturity, and which should come into the treasury after maturity, that had not been appropriated to some other purpose. No surplus existed in the general fund of

the State treasury for many years after the date of maturity stated in the bonds had passed, and no provision for paying them was made. If they had been presented for payment, they could not have been paid for want of funds. *The bondholder could not sue the State*, for no law authorized him to do so. "The State by reason of her sovereignty still held control of the question of payment as to all its incidents of time, mode and measure." So it was said, upon the authority of *Underhill vs. Sonora*, *Freehill vs. Chamberlain*, and *Lincoln County vs. Luning*, that, "it is a general rule that when payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the statute of limitations without showing that the particular fund has been provided, or the method pursued." *This certainly falls very short of establishing the doctrine contended for.*"

So we say here, these coupons in the case at bar—like the coupons in the Kansas case—are "*general promises to pay at all events, upon a certain day.*" No particular fund was at the time of their issue expressly pledged in advance for their payment, nor is their source of payment confined to any fund exclusively, and, as we have already seen, this same Kansas case holds that money accumulated from taxes, with which to meet a *general obligation* is not a "particular fund."

This is not a case similar to such cases as where the instruments are to be paid *solely* out of some specific source of municipal revenue—for instance revenue derived from operating a municipal waterworks, which so often has been a popular scheme for deriving funds to

pay municipal obligations—hence the coupons here must in accordance with their terms “mature according to contract” and be deemed *general* obligations.

Furthermore, the very cases which the United States Supreme Court cites in the Luning case are altogether inapplicable here. It is only necessary to refer to Underhill vs. Sonora, 17 Cal., 173, to see that the federal court did not mean to say that the Underhill case furnishes any foundation for the “particular fund” doctrine, because such doctrine is not mentioned therein, but the doctrine of the recognition of the debt by subsequent legislation is mentioned and that is the point upon which the Underhill case turned.

As to the case of Freehill vs. Chamberlain, 65 Cal., 603, any assertion respecting the applicability of that case to the one at bar, would be equally untenable. The Freehill case is distinguishable from this case on several grounds. The Freehill case was one for mandamus against the treasurer of Sacramento to pay certain coupons representing interest on bonds issued under authority of act of the legislature of April 24th, 1858. Section 1 of the act (California statutes 1868, p. 268), provides that the City of Sacramento “*shall not be sued in any action whatever,*” the Wright Irrigation Act, on the contrary, permits an irrigation district to be sued. As the treasurer of Sacramento could not be compelled to pay the coupons until money came into his hands, of course, mandamus would not lie against him until that time and that was all the Freehill case really held.

The case of Barnes vs. Glide, 117 Cal., 1, discusses

the Freehill case and shows that the cause of action in the latter case *had not accrued*, thus furnishing the grounds—and under our statute of limitations *the only grounds*—for holding the statute had not been set in motion. The Barnes case was an action for mandamus against the trustees of a Swamp Land District, to compel them to levy an assessment upon the lands of the district for the purpose of paying certain warrants. The warrants directed the treasurer to pay the sum mentioned therein “from the Swamp Land Fund,” and had, prior to the commencement of the action, been presented for payment and been marked “not paid for want of funds,” and thereafter, registered. In the complaint, it was alleged that since the issuance of the warrants, there never had been in the treasury of the county, to the credit of the Swamp Land District, sufficient money to pay the warrants, but it was also alleged that the defendants had money in their hands, belonging to the district and it was prayed that the same be turned over to the county treasurer.

The act providing for the organization of such districts is found in Cal. Stats. of 1868, p. 515, and contains many features similar in effect to the Wright Irrigation District Act. In fact, the Fallbrook Irr. Dist. vs. Bradley, 41 L. Ed. (U. S.) 393, the Federal Supreme Court, said:

“The formation of irrigation districts is accomplished by a proceeding so closely analogous to those prescribed for the formation of swamp land reclamation districts that *the decisions with respect to the latter are authority as to the former*, and we



cite as conclusive of this point *People vs. Hagar*, 52 Cal., 181, 66 Cal., 60. Many decisions to the same effect are cited by the briefs of counsel, but we deem it unnecessary to refer to them."

It would be observed that in the Barnes case, *warrants* were involved, drawn upon a fund, called the "Swamp Land Fund," and which warrants had been registered. The defendants pleaded the statute of limitations. From the abstract of the appellant's brief, accompanying the opinion of the Court (117 Cal., 2), it appears he also adopted the attitude taken by the defendant in error here, and in order to avoid the statute of limitations, claimed that the cause of action had not accrued *on the warrants*, but possibly this attitude was not so fatal to the appellant in the Barnes case, as it is here to the defendant in error, because the Barnes case was one for *mandamus* against the officers of the district, while here the case is brought against the Irrigation District itself and a *money judgment is asked for on coupons*. Should we assume that the defendant in error is correct in saying these coupons here are payable from a particular fund, we are even then not confined to the question whether *mandamus* will lie against the officers of an irrigation district to compel them to levy an assessment for the purpose of replenishing such fund. The question here would be more comprehensive than that and would be: whether an instrument, assumed to be drawn on a "particular fund"—which term involves the theory that such instrument fastens no *general* liability on its maker, the creditor being confined to such fund for payment—can maintain an action, not for man-

damus, but *for a money judgment on the coupons themselves*, when he alleges there is no money in the only source from which they are payable and to which source he is compelled to look alone for payment?

If he is not so compelled, then a *general* liability of the maker arises, as we have seen from the authorities cited, and the “particular fund” theory necessarily vanishes.

On the other hand, should it be held that the fund under discussion here is strictly a “particular fund” and that, notwithstanding this, the defendant in error can maintain suit regardless of the non-existence of such fund, then he must concede that his cause of action *accrued* many years ago. If this action did so accrue, the statute necessarily became active.

Notwithstanding the instruments in the Barnes case were registered warrants (and therefore fell within the class of paper to which the particular fund doctrine has been applied, by the courts with peculiar force, and notwithstanding there were infinitely better grounds for calling the fund in the Barnes case a “particular fund” than exist here), the Supreme Court of California held that the statute barred the suit, and said:

“The reason and philosophy upon which the statute of limitations is based apply here with full force. The warrant set up in the first count of the complaint was issued, presented, and payment thereon was refused, in November, 1877; and this present suit was not commenced until November, 1895, which was eighteen years thereafter. The date of the latest warrant set up in the complaint is

1881, more than fourteen years before the commencement of the action. The present board of trustees, who are made defendants, do not appear to have occupied that position for a longer period than six months prior to the commencement of the suit. The warrants sued on were issued, if at all, by other trustees who were in office from fifteen to eighteen years before this proceeding was instituted. They may have been issued illegally; the act of issuing the mmay have been ultra vires; they may not have been issued for any labor done in the construction of the works of the district; they may have been issued without consideration and fraudulently; they may be forgeries. And it is quite evident that the present defendants, after such a lapse of time, would be in no condition to make any of the defenses above indicated, when witnesses who knew of the facts at the time may be dead, or may have allowed the recollection of them to vanish from their memories. And the evident purpose of the statute of limitations is to prevent such a condition of affairs, and to preclude parties from disturbing that repose which is intended to be final, after the lapse of certain periods of time designated in the statute itself. The position *cannot be successfully maintained* that no action could be commenced *until a demand had been made* by plaintiff upon the defendants to act. Whether such demand be necessary in a case like the present it is not necessary to determine; for *the demand itself was an act within the power of the plaintiff*. In *Prescott vs. Gonser*, 34 Iowa, 179, the court say:”

“That the action of mandamus cannot be maintained until there has been a refusal to perform the official duty sought to be enforced is true, but to

hold that the plaintiff who has a right to demand performance at any time may delay such demand indefinitely would enable him to defeat the object and purpose of the statute. It is certainly not the policy of the law to permit a party against whom the statute runs to defeat its operation by neglecting to do an act which devolves upon him in order to perfect his remedy against another. If this were so, a party would have it in his own power to defeat the purpose of the statute in all cases of this character. He could neglect to claim that to which he is entitled for even fifty years unaffected by the statute of limitations, thereby rendering it a dead letter. In such a construction of the statute we cannot concur." See, also, to the same effect, *Baker vs. Johnson County*, 33 Iowa, 151. If the facts stated in the complaint in the case at bar constitute a cause of action, they constitute a cause of action which accrued, and for which an action might have been instituted, from fourteen to eighteen years before the present complaint was filed. *The statute of limitations is intended to embrace all causes of action not specially excepted from its operation*; and there is no exception applicable to the present proceeding. *Bates vs. Gregory*, 89 Cal., 387, was an application for a writ of mandate to compel the trustees of the City of Sacramento to do certain acts; the defendants therein set up the statute of limitations; and this court said: "A municipal corporation has the legal right to avail itself of the defense of the statute of limitations as fully as any other creditor. It is a privilege personal to the debtor, and whenever, in any legal proceeding it is invoked by the debtor the court is



compelled to recognize it as a proper defense. This defense is pleaded in the present proceeding, and, as we have before show, is sustained by the facts, and must therefore be held sufficient."

Appellant relies greatly on *Freehill vs. Chamberlain*, 65 Cal., 603; but *that case is not pertinent to the case at bar*. That case was simply mandamus to the treasurer of the city of Sacramento to compel him to pay the interest on certain bonds. Those bonds had been issued by the city under the act of April 24, 1858 (Statutes of 1858, p. 280,) which has frequently been held by this court to constitute an express contract between the city and the bondholders, by which the latter *were prohibited from suing the city*, and were to rely exclusively upon a certain special fund distinct from the general fund and all other funds of said city. The *only remedy* which the bondholders had was mandamus against the city treasurer to compel him to pay the interest on the bonds when there was money in the fund *to which they could alone look* under their special contract; and *all that the court decided* in *Freehill vs. Chamberlain* was that no cause of action in mandamus against said treasurer had accrued until there was money in said fund, and that consequently the statute of limitations did not commence to run while there was no money in said fund with which the treasurer could pay said interest. It was not a proceeding which might have been commenced fifteen years before it was instituted.

*Barnes vs. Glide*, 117 Cal., pgs. 7, 8 and 9.

We submit the language of the California Court is singularly appropriate here. Why should the Rialto

Irrigation District, comprising thousands of acres of land and the interests of a multitude of industrious ranchers, be subjected to the hardship of having a special exception—not mentioned by the legislature—engrafted upon the statute of limitations for the benefit of the defendant in error, who until the commencement of this action, never took a single step to enforce the payment of these coupons? Here, as in the Barnes case, the district board of directors is not the same as the one which existed when these bonds were issued a quarter of a century ago; here, as in that case, witnesses are dead and scattered; here, as in that case, if the facts stated in the complaint constitute any cause of action at all, they constitute a cause of action which accrued on many of the coupons, and for which an action might have been instituted more than ten years before this action was commenced; here we may truly say, as was said in the Barnes case, “the statute of limitations is extended to embrace *all* causes of action not specially excepted from its operation and *there is no exception applicable to the to the present proceeding..*”

In the Barnes case, we submit, the remarks of the court, with reference to the Freehill case, are unanswerable and obviously cut away the foundation of any hypothesis that the Freehill case is authority for anything more than the point that no cause of action in mandamus had *accrued* against the treasurer until there was money in the fund in question. How could such a cause of action otherwise accrue against him? He could not be mandamusd to perform an impossibility, to-wit:

to pay to coupon holders funds which were non-existent; and of course, no action could lie on the coupons against the City of Sacramento, because the law forbade it, and hence the case fell within a statutory exception to the running of the statute of limitations.

Section 356 of our Code of Civil Procedure says:

“When the commencement of an action is stayed by injunction *or statutory prohibition*, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.”

To the same effect is Section 27, enacted in the year 1850, (Cal. Statutes 1850, p. 346.)

In *Kendall vs. Porter*, 120 Cal., 106, the plaintiff applied for a writ of mandate to compel the treasurer of Sacramento to pay the principal and interest on certain bonds, and the precise question we are now discussing was not involved in that case, but in a dissenting opinion of Chief Justice Beatty, in which Mr. Justice Van Fleet concurs, it is said:

“In *Freehill vs. Chamberlain*, *supra*, which was mandamus to compel the treasurer to pay coupons more than four years past due, the statute of limitations was interposed as a defense, but it was held that, since *the city could not be sued* upon the coupons, the statute did not begin to run until the money applicable to the payment of the coupons was in the sinking fund, *the implicit concession being that the coupons would have been barred if there had been any general obligation resting upon the city to pay.*”

As it cannot be questioned the coupons, in the case at

bar, fix a *general* obligation to pay them upon the irrigation district, it is useless to argue that those coupons which matured four years or more before this action was commenced are not barred by the statute. If the explicit and express promises to pay, contained in those coupons, do not constitute "general" obligations, by what other language, we ask, would it be possible to make an obligation a "general" one?

The case of Savings Union vs. Reclamation District, 144 Cal., 659, is instructive and in point. That case was an action to recover money due on warrants drawn by order of the board of trustees of the defendant on the county treasurer, approved by the board of supervisors, and not paid for want of funds. While the question there at issue is not directly involved in the case at bar, the court distinctly holds that no suit on the warrants could be brought against the district itself and recognizes the propositions herein contended for, notwithstanding the Luning case and Robertson vs. Blaine County and others were cited as upholding the particular fund doctrine. At page 648, there is found the following language:

"The claims accrued during the period from 1872 to 1887. They were all allowed, warrants drawn, payment refused for want of funds, and *all existing remedies to compel payment barred by the statute of limitations* many years prior to the enactment of the amendment. If the amendment is construed to give the right to maintain an ordinary action at law upon these allowed claims, it will be of no benefit whatever to the plaintiff. Its right to



a mandate, either against the county treasurer to compel payment, if there were in fact available funds, *or against the trustees and supervisors* to compel an assesment to raise funds, if in fact there were none, *became complete and perfect upon the original refusal to pay the claims.* The statute of limitations at once began to run against this right, and become barred within five years thereafter, if not sooner. (*Barnes vs. Glide*, 117 Cal., 1.) A judgment against the defendant in an action upon these claims would be of no direct benefit to the plaintiff, and would set him no further on the road to recovery of his money than he was at the time the claims were originally allowed. The judgment could not be collected on execution. The district has, and under ordinary circumstances could have, no property subject to execution. (*Hensley vs. Reclamation District*, 121 Cal., 96.) It has no right to acquire property except for the purpose of carrying on the work of reclamation and matters incidental thereto. Property devoted to that sort of public use, and belonging to a public corporation or public agency, cannot be levied on and sold to satisfy judgments against such corporation or agency. The only means by which the plaintiff could obtain payment of such a judgment would be by resort to the remedy which he had in the first instance, that is to say, a suit in mandamus to compel the levying of an assessment whereby money could be raised with which to pay the same. But this remedy, as we have seen, has been long since barred."

Although our case was unlike the last case, because in the latter an action *on the warrants* did not lie

against the reclamation district, yet this very dissimilarity obviously adds strength to our contention, because the entire controversy here harks back to the question—when could the defendant in error have brought suit against the irrigation district on these coupons? The reply to that query will also answer the question as to when the statute of limitations was set in motion.

With these California authorities in mind, and advert-  
ing again to the case of Lincoln County vs. Luning, it is clear that it is a mistaken notion to hold that the case at bar is governed by the Luning case because:

(1.) The pivotal point on which the Luning decision turned was the recognition of the debt and the extension of time for its payment arising from the act of 1877.

(2.) That act of 1877, after the creditor had acted upon it and registered his coupons, was held to amount to a new provision for payment, which was accepted by the creditor and created a new right upon which he could rely.

(3.) The California cases of Underhill vs. Sonora and Freehill vs. Chamberlain, cited in the Luning case, supply no foundation for the broad statement that in a suit brought on *general* obligations, the statute will not run from the maturity of such obligations.

(4.) That should the citation in the Luning case of these two California cases, be deemed to furnish a foundation for the idea that the Federal Supreme Court, based its decision in the Luning case upon two California cases where the situation was similar to the one pre-

sented in the case at bar, such assumption would necessarily result in making an inverted and baseless pyramid of the Luning decision and would be charging that high court with being devoid of logic or common sense.

(5.) It is not necessary so to do, because the language of that court shows that the Underhill case was only cited on the proposition that the act of 1877 recognized the debt and made provision for its payment, thereby *extending the time of payment*; and the Freehill case was only cited on the proposition that where a statute provides for coupons being payable “as fast as money should come into the treasury from special sources” the statute will not run. As we have seen, the Freehill case did hold that no cause of action against the treasurer accrued until he had money in his hands, and no cause of action had accrued against the city, as the city *could not be sued*, hence Freehill was prevented from having his day in court. Here, the defendant in error was not obliged to wait, before bringing his action, until money came into the treasury of the district. This is not a case where there is anything whatever in the coupons which suggests or intimates that they are only payable or only mature “as fast as money should come into the treasury.” Nor can a general liability which by Sec. 17 of the Wright Act (Cal. Stats., 1887, p. 37,) is to be paid by revenue derived from annual assessments upon all of the real property of the district—all of which real property is expressly made liable to such assessment—be converted into an obligation payable solely from “special sources.” To hold otherwise would not

only make all municipal bonds subject to the particular fund doctrine, but such a decision would be hopelessly irreconcilable with such cases as

Schoenhoeft vs. Kearney Co., 92 Pac., 1097.

United States vs. Clark Co., 24 L. Ed., (U. S.) 628.

Avery vs. Job, 36 Pac., 293; Mutual Benefit Insurance Co. vs. Elizabeth, 42 N. J. L., 235.

United States vs. Fort Scott, 25 L. Ed., (U. S.) 349.

Vickey vs. Sioux City, 115 Fed., 437.

United States vs. Saunders, 124 Fed., 131.

Kimball vs. Commissioners, 21 Fed., 145.

Eaton vs. Mimnaugh, 73 Pac., 745.

(6.) In the Luning case, no mention is made of the existence of any mandatory statute of limitations similar to section 312 of our code, which admits of no unspecified exception being made to its operation, which section is backed by our State constitution prohibiting the enactment of special legislation respecting the statute of limitations.

(7.) Since the rendition of the Luning decision, in the year 1890, our State Supreme Court has rendered such decisions as Barnes vs. Glide, 117 Cal., 1; S. F. Savings Union vs. Reclamation District, 144 Cal., 639, and Cal. Safe Co. vs. Sierra Rwy. Co., 158 Cal., 691, holding that the statute runs against such coupons as these. This being the case, should we indulge the baseless presumption that the Luning case was ever applicable to this case at bar, it still remains true that the



Federal Courts will follow the latest expressions of the California Supreme Court in construing the statute of limitations (*Leffingwell vs. Warren*, 17 L. Ed., (U. S.) 271), even though they be at variance with former decisions of the same court, which is certainly not the case with respect to the decisions of the California Supreme Court on this subject.

We have discussed the *Luning* case at such length because it seems to have been particularly relied upon by the learned District Court and by our opponents as the leading case on the particular fund doctrine and as a precedent to apply to the case at bar, but it would seem that this discussion is largely an act of supererogation when it is recalled that this same Circuit Court of Appeals, in the case of *Mather vs. San Francisco*, 115 Fed., 37, decided in the year 1902, that neither the *Luning* case, nor the particular fund doctrine was applicable to California municipal bonds, and ploughed over the same ground that we are now traversing.

### **Mather vs. San Francisco.**

In the *Mather* case, the identical Section 337 of our code which is pleaded by the irrigation district here was pleaded also there. In the brief of the plaintiff in error, filed in this court in that case, it is stated "that the complaint alleges that there hasn ever been collected and placed in special fund a sufficient amount to pay the coupons as they mature." On page 24 of this brief, the particular fund doctrine is discussed and he cites, in support of his contention, the same cases upon which

our antagonist relied in the court below, among which are:

Sawyer vs. Colgan. 102 Cal., 292.

Freehill vs. Chamberlain, 65 Cal., 603.

Lincoln County vs. Luning, 133 U. S., 533, and says:

“Cannot plead statute of limitations without showing that the particular fund has been provided or method pursued.”

The bonds and coupons involved in the Mather case presented a much stronger case for the application of the particular fund doctrine than those in the case at bar, as the act under which they were issued provides (Cal. Stats., 1875-76, p. 433) that assessments made to create a fund, with which to pay the bonds and coupons should be restricted to a certain area of the municipality; that the fund so raised should be paid over to the treasurer of San Francisco, and should constitute a fund called “Dupont Street Fund,” which fund should be paid out *only* in payment of the bonds and coupons and, by section 22 of the act, the holders of the bonds were stripped of any claim, they would otherwise have had, *against the municipality* on the bonds.

This court, through Mr. Justice Gilbert, points out in its opinion, that the bonds had not been paid “for the reason that the fund for the payment thereof has not been created as the law required that it should be created.” (p. 42). This court further holds that the bonds are payable “*out of a special fund* to be provided by the city” (p. 42) and that “the defendant in error

has been remiss in the performance of its duty” (in not providing such fund). This court further said:

“The demurrer raises the further objection that the cause of action upon all but two of the coupons is barred by the statute of limitations. Section 9 of the act provides that the bonds shall be payable in 20 years, and that coupons for the semi-annual interest shall be attached to each bond. The bonds bear date January 1, 1877. The present suit was commenced June 22, 1900. By the statute of limitations of California (section 337, Code Civ. Proc.) *actions on such written instruments are barred after four years.* All the coupons matured more than four years prior to the commencement of this suit, except the last two, which became due, respectively, July 1, 1896, and January 1, 1897. In *Leffingwell vs. Warren*, 2 Black, 599, 17 L. Ed., 261, it was said:

“The courts of the United States, in the absence of legislation upon the subject by congress, recognize the statutes of the several States, and *give them the same construction and effect which are given by the local tribunals.*”

That doctrine has been affirmed in *Green vs. Neal's Lessee*, 6 Pet., 291, 8 L. Ed., 402; *Harpending vs. Dutch Church*, 16 Pet., 455, 10 L. Ed., 1029; *Davie vs. Briggs*, 97 U. S., 628, 24 L. Ed., 1086; and *Amy vs. Dubuque*, 98 U. S., 470, 25 L. Ed., 228. In the case last cited it was also held that the statute of limitations of the State of Iowa begins to run against coupon interest warrants from the time when they respectively mature, although they remain attached to the bond which represents the principal debt. In reaching that

conclusion the court proceeded upon principles which apply generally *to all cases of actions upon coupons*, except where the question is controlled by some peculiar statutory provision or decision of a State court establishing a different rule. Those principles *undoubtedly apply to the case at bar*, and require us to hold that the statute of limitations has run as to all coupons except the last two, unless a different construction has been placed upon the statute of California by the decision of the Supreme Court of that State in *Meyer vs. Porter*, 65 Cal., 67, 2 Pac., 884, in which it was said: 'And as the coupons partake of the nature of the bonds to which they belong, and against which the statute of limitations had not run, they were not barred by the statute.' It is claimed for this utterance of the court that it announces the rule that an action upon coupons is not barred until the statute of limitations has run against the bonds to which they were attached. We do not so understand the decision, although it is impossible, from the meager statement of the case, to determine the precise bearing of the remarks of the court. We are inclined to think that by the use of the language so quoted it was intended only to affirm the well-settled rule that in the application of the statute of limitations the coupon, although it may not be in form the same kind of instrument as the bond to which it belongs, will partake of the contractual nature of the latter, and both will be governed by the same statute of limitations; that is to say, if the bond be a specialty, the coupon, which may be a simple promise to pay, will be considered a specialty, and be governed by the statute of limitations applicable to specialties."

It is interesting to note that in the recent case of Cal-



ifornia Safe etc. Co. vs. Sierra Co., 158 Cal., 693, (from which case, we have already quoted in this brief and where were involved bonds issued long after the date of the decision of Meyer vs. Porter) the California Supreme Court concurs in the views of this court, respecting the case of Meyer vs. Porter, and adds that there is nothing in the latter case to prevent the court "from applying the rule supported by reason, *as well as by overwhelming authority*, viz: that, in the absence of some special circumstance to the contrary, the period of limitation of an action on coupons begins to run *from the date of the maturity of the coupons.*"

It is difficult indeed to see how the California court could have logically held otherwise when it is borne in mind that the same court had repeatedly held, long before the decision of Meyer vs. Porter, that our statute of limitations applies to *all* actions and that the courts can add no exceptions to the statute, and the federal courts had also previously held that the statute runs against coupons without reference to the maturity of the bonds.

(Koshkoning vs. Burton, 26 L. Ed. 886.

Amy vs. Dubuque, 25 L. Ed., 228.)

To adopt the theory that the court in Meyer vs. Porter intended to express the idea that no action would accrue upon a coupon until the maturity date of the principal of the bond to which the coupon belonged, would result in placing the court in a position where it would be isolated by overwhelming authority to the contrary. Under Section 312, C. C. P., it is certainly necessary to show that no action on these coupons has accrued,

before any foundation can exist for the supposition that the statute has not run against them.

In 19 Am. and Eng. Enc. of Law, (2nd Ed.,) p. 205, it is said:

“Where payments are to be made in installments, the statute runs against each installment from *the time when it is due.*” (Citing numerous cases.)

That this is the general rule cannot be denied, and there exists here no special circumstance which causes this case to fall within any exception specified in our statute of limitations.

Furthermore, should we assume that the California court in Meyer vs. Porter did—in defiance of well-settled principles and notwithstanding the same court has explained the case in a contrary way—really announce the doctrine unsuccessfully contended for in the Mather case, it would even then, we respectfully submit, make no difference, or preclude this court from ignoring the Meyer case and following later decisions, because such doctrine simply referred to the statute of limitations. It is an elementary principle that the statute affects only the *remedy* and not the *obligation* of a contract, and the legislature may make any reasonable change in the length of the period of limitation within which to commence an action upon an existing contract; because the parties to a contract acquire no vested right in the time for commencing such action.

Terry vs. Anderson, 24 L. Ed. (U. S.), 365.

Billings vs. Hall, 7 Cal., 1.

19 Am. and Eng. Enc. of Law (2d Ed.), 168.

The decision of a State court in construing the statute can have no more binding force than the statute itself, and hence, if such decision should be deemed to become a part of the statute, the decision is equally with the statute, subject to subsequent change by a later decision, without impairing any vested right of the party to the contract, affected by such later decision, and therefore, we submit, the federal courts will, upon the subject of the statute of limitations, adhere to the rule, enunciated in the authorities we have mentioned, and follow the *latest decisions* of the highest court of the State respecting that statute.

Leffingwell vs Warren, 17 L. Ed. (U. S.), 261.

Balkam vs. Woodstock Iron Co., 38 L. Ed. (U. S.), 953.

As it must be admitted that the fund in the Mather case from which the bonds there were payable, was infinitely closer in resemblance to what, in contemplation of law, is called a "particular fund" than are the funds from which the bonds here are payable, and as the same reasons were advanced and the same authorities cited in the Mather case as were advanced and cited in the case at bar, in the District Court, we submit that the Mather case is decisive upon this case and the principle, so clearly upheld in the Mather case, respecting the running of the statute, *a fortiori* applies to the case at bar, where unquestionably the coupons are mere *general* obligations.

The Mather decision has been approved by this court since its rendition, and was cited and relied upon as

authority in the subsequent case of *Shapter vs. San Francisco*, 115 Fed., 1021, and it was also cited by the Circuit Court in *Eddy vs. San Francisco*, 148 Fed., 277, and by the California Supreme Court in *Cal. Safe Dep. Co. vs. Sierra Co.*, 158 Cal., 690.

Doubtless, the learned District Court would have followed the *Mather* case but it was argued by our opponent that the particular fund doctrine "was not discussed" in that case and the court apparently, for that reason, did not give the decision the weight to which it was entitled. We have seen this idea was a fallacy, as the subject was thoroughly thrashed over in the briefs and the opinion of this court expressly refers to the fact that the bonds are payable "out of a special fund," and that they had not been paid by reason of the city being remiss in failing to provide such fund. (Page 42.) In any event, where a legal decision is made in an action, it would indeed be injecting a startling tenet into our system of jurisprudence, to hold that such a decision does not constitute a precedent and may be ignored in a later case, embracing similar questions, unless all the reasons for such decision are set forth in the opinion of the court.

*Houston vs. Williams*, 13 Cal., 24.

It is also very plain that the fact that the federal courts generally have no original jurisdiction in mandamus, constitutes no reason for holding that the statute has not run against the coupons in this case. It is obviously reasoning in a circle to say that although it must be conceded the statute would have run in a State court



against these coupons, yet, as in the federal courts, mandamus is not generally available before judgment, the statute is held in abeyance, and the cause of action on the coupons becomes thereby endued with eternal life—in fine, such a preposterous notion necessarily involves the proposition that no right to sue arises until the plaintiff is entitled to the writ of mandate. The mere statement of such an hypothesis carries with it its own refutation. We have seen that the “right to sue” is synonymous with the accrual of a cause of action, and that it is beyond controversy that the accrual of the cause of action synchronizes with the commencement of the running of the statute.

Amy vs. Dubuque, 25 L. Ed., (U. S.) 228.

Harrigan vs. Insurance Co., 128 Cal., 531.

McDaniel vs. Cherryvale, 136 Pac., 899.

Section 312, C. C. P.

If then, the defendant in error has not become vested with the “right to sue,” let him march out of court. On the other hand, if he has acquired the right to sue, let him admit the inevitable result, which is the accrual of the cause of action and the consequent running of the statute. He cannot set at naught all principles and rules of common sense and logic and contend for a certain premiss, without at the same time subjecting himself to the effect of the unavoidable conclusions which the law, from time immemorial, has said shall flow from that premiss.

This extraordinary, specious and palpably unsound doctrine—that mandamus being unavailable to a plain-

tiff in the Federal Courts before judgment results in the statute not running—was argued in the trial court with sufficient force to “deceive the very elect” and, in answer to the plea that the action was barred by the statute, the learned court in his opinion rendered herein, says:

“This argument, however forcible as to a suit in the State court, where mandamus may be resorted to in the first instance, cannot apply to one in the federal court, for the reason, that, in the latter court, mandamus is not available in the first instance, but only after the plaintiff’s claim has been reduced to judgment.

Under these circumstances, to hold that the statute begins to run against a suit in the federal court from the date when plaintiff’s right to mandamus accrued in the State court, would be practically a denial of plaintiff’s right to sue in the federal court, which unquestionably has jurisdiction over his controversy; in other words, it would be to hold, in effect, that federal jurisdiction can be ousted by State law.

On this subject may be aptly quoted the following extract:

“To hold that, because mandamus is available in the first instance in the State court, but not in the federal court, therefore plaintiff must sue in the former, would be to hold, in effect, that federal jurisdiction can be ousted by State law, which we know is not the case. (*Lincoln Co. vs. Luning*, 133 U. S., 529; *Hyde vs. Stone*, 20 How., 175; *Suydam vs. Broadnax*, 14 Pet., 67; *Bank vs. Vaiden*, 18 How., 503; *Reagan vs. Trust Co.*, 154

U. S., 420.'') (Shepard vs. Tulare Irrigation District, 94 Fed., 4.)

I am of the opinion, that the case at bar falls under the particular fund doctrine declared by the Supreme Court in Lincoln County vs. Luning, 133 U. S., 529, and later by the Circuit Court of Appeals for this circuit in Robinson vs. Blaine County, 90 Fed., 63, 70. See also Freehill vs. Chamberlain, 65 Cal., 603.

The later cases of Mather vs. San Francisco, 115 Fed., 37, and Eddy vs. San Francisco, 162 Fed., 441, *are not conflicting authorities*, because in neither one of said cases is the particular fund doctrine discussed by the court.

Judgment will be entered for the plaintiffs, and their attorneys are requested to prepare suitable findings, and submit them to the court for its action after serving copies upon defendant's attorneys.

OLIN WELLBORN,

Judge.

We respectfully submit that the theories, contended for by our opponent and followed by the learned trial court, arise from failing to discriminate between a "right" and a "remedy"—the latter being simply the means by which the obligation is enforced. (Frost vs. Witter, 132 Cal., 526; 34 Cyc., 1201.) What, we ask, has the remedy to do with the cause of action or its accrual? (See Frost vs. Witter, *supra*.) The pole star to guide us here, as to the question when the statute commenced to run, will be found in the determination respecting *the time the action accrued*, or in other words, when could the defendant in error have brought this suit? The learned court apparently failed to realize

that the defendant in error could have brought this suit upon the respective maturity dates of these coupons.

Whether the relief sought by a plaintiff be a money judgment, or a writ of mandate, concerns only the *remedy* and has nothing to do with *the cause of action*, which, in this case is the breach of the promise to pay these coupons. In *Butler vs. Johnson*, 111 N. Y., 204, in referring to the statute of limitations, says the New York Court of Appeals:

“There can be no sense in enlarging the time by a mere change of the form of the remedy sought, where the subject matter of the action is precisely the same, and the remedy in either was adequate.”

*Young vs. Turner Co.* (Oct. 1914) 48 Cal., Decisions 461 (advanced sheets), where the original complaint prayed for a specific performance of a contract and a supplemental complaint was filed *praying for a money judgment* on the same contract, the California Supreme Court said:

“The supplemental complaint in this case related to a matter occurring after the commencement of the action *which concerned the remedy rather than the cause of action.*”

See also *Meath vs. Phillips County*, 27 L. Ed. (U. S.), 819.

It is too clear to require argument to show that this is not a case where the obligations sued on are only payable *when there are funds* and where the municipality has *prevented* such funds being raised and then required the creditor to look to the fund and *not to itself*.

On the contrary, these coupons are *general* obliga-



tions upon which immediately upon maturity, money judgments against the irrigation district itself could have been sued for *in any federal or other court* in California, regardless of the question as to whether the remedy of mandamus was available. If then, a judgment on the coupons is part of the necessary machinery in the federal courts before mandamus can be resorted to, it still cannot be gainsaid that there was no obstacle whatever to prevent the defendant in error bringing suit to obtain such judgment as soon as the coupons severally matured.

Mather vs. San Francisco, *supra*.

Cass Co. vs. Johnson, 24 L. Ed. (U. S.), 416.

Davenport vs. Dodge Co., 26 L. Ed., (U. S.) 1018.

Shapter vs. San Francisco, 110 Fed. 615, and 115 Fed., 1021.

Bates vs. Gregory, 89 Cal., 387.

Herring vs. Modesto Irr. Dist., 95 Fed., 705.

We further submit that there is nothing in the situation presented in the case at bar, which for one moment justifies the idea that the plaintiff in error, claims or ever has claimed that the relief asked by the defendant in error is only obtainable in the State courts, thereby maintaining that the federal courts have no jurisdiction of this case, which would be equivalent to an attempt to oust the jurisdiction of those courts. All of the argument of the defendant in error in the trial court respecting the alleged ousting of the jurisdiction of the fed-

eral courts, is, we submit, beside the case and clearly a *petitio principii*.

What has the question in regard to the statute of limitations in this case to do with ousting the jurisdiction of the court?

We do not deny the right of the defendant in error to enter this court, but what we do confidently assert is, that if he postpones such entry until many years after his right to sue for a judgment has become ripe, he must, in common with other litigants, suffer the consequences established by law and not claim the benefit of any exception which the statute expressly withholds from a tardy plaintiff suing upon belated claims.

### **Sawyer vs. Colgan.**

It has also been contended that the case of Sawyer vs. Colgan, 102 Cal., 283, supports the so-called "particular fund doctrine" and should rule such a case as the one at bar. The Sawyer case was one of the cases relied upon by the plaintiff in error, in the Mather case, and was cited as authority in his brief on file in this court. That this court had the soundest reasons, when considering the Mather case, for declining to follow the Sawyer case, clearly appears from an examination of the Sawyer case, and we submit, equally sound reasons exist for holding the Sawyer case entirely inapplicable to the case at bar.

In the Sawyer case, writ of mandate was prayed for against the State controller, commanding him to issue a warrant upon the State treasury for the amount due upon a bond, and the court said:

“The findings show that in 1890, for the first time, a surplus of about five hundred thousand dollars was received into the State treasury. Prior to that time the petitioner never could have maintained a mandate for the payment of his coupons, and this being so, of course, the statute of limitations is no bar to the proceeding. The words of the act, “not otherwise appropriated”, cannot be taken to mean ‘not heretofore otherwise appropriated.’ \* \* \* \*

“No provision was made by the State for the payment of these bonds until the year 1889, and we are of the opinion, therefore, that the statute did not begin to run against the bonds or coupons until that time. If the petitioner had presented his coupons for payment prior to that time, his demand would have been refused on the ground that there were no funds. *He could not sue the State*, because there never was any act authorizing him to sue. ‘His remedy—if remedy it may be called—still lay in the voluntary exercise of the taxing power of the State. In other words, the State, by reason of her sovereignty, *still held control of the question of payment* as to all its incidents of time, mode, and measure.”

Sharp vs. Contra Costa County, 34 Cal., 284.

Rose vs. Estudillo, 39 Cal., 270, 275.

People vs. Miles, 56 Cal., 401.

Here again was a case where the cause of action had not accrued and consequently, the statute did not run. Like the case of Freehill vs. Chamberlain, *supra*, no right to mandamus would arise against Colgan, until the power of the State had been voluntarily exercised for

bringing the necessary funds into existence, and Sawyer *was precluded from suing the State*. This being the situation, there is no resemblance between the Sawyer case and this case and the remarks of the Kansas Supreme Court in *Schoenhoeft vs. Kearny Co.*, 92 Pac., 1097, which we have already quoted and which refer to the Sawyer case are peculiarly apposite when that court says that the Sawyer case “certainly falls very short of establishing the doctrine contended for” — that doctrine being the “particular fund” doctrine and consequent immunity from the effect of the statute of limitations.

Unlike the cases of *Sawyer vs. Colgan* and *Freehill vs. Chamberlain*, where the plaintiffs had no remedy whatever, here, in the case at bar, a number of courses have been open to the defendant in error, ever since the maturity of these coupons, to-wit: (a) Upon their maturity, he could thereupon have sued on the coupons in the federal courts for a money judgment. (b) He could have done the same thing in the State courts. In such event, the absence or presence of funds would not have furnished any defense or affected the accrual of the cause of action. If no funds were available to pay such judgment, as soon as it was rendered in the State court, he could have obtained writ of mandate to compel levy of sufficient taxes to yield such fund, as such writ is available in the State courts after such judgment is rendered as well as before.

In *Nevada National Bank vs. Supervisors*, 5 Cal., App. Reports, 638, (District Court of Appeals for Third Appellate District of California) where a judgment had



been rendered on Irrigation District bonds, it is said in the syllabus:

“Where the board of directors of an irrigation district have refused to levy an assessment to pay the interest on its bonded indebtedness, and the board of supervisors, after a petition therefor, have refused to levy such assessment, as provided by the Act of March 31, 1897, providing for the organization and government of irrigation districts, the superior court of the county in which the irrigation district is situated has jurisdiction to compel the levying of such assessment by the board of supervisors, in the absence of a showing that the office of its board of directors is not within the county. The presumptions are in favor of the jurisdiction of the court.”

In its opinion rendered in that case, the court said:

“It seems to be established by the authorities that the proper course to pursue when municipalities refuse to pay their bonds is by an action at law to establish the validity of the bonds and the amount due thereon, *and then to apply for a writ of mandate* to compel the proper authorities to raise what is required to satisfy the debt by the assessment and levy provided by statute. The following cases cited by respondent so hold: *Heine vs. Commissioners*, 19 Wall., 655; *Herring vs. Modesto Irr. Dist.*, 95 Fed., 705, 710; *Marra vs. San Jacinto and Pleasant Valley Irr. Dist.*, 131 Fed., 780, 789, and *Board of Supervisors of Riverside County vs. Thompson*, 122 Fed., 860 (59 C. C. A. 70.) The latter case was similar to the one at bar, involving the same statute, and from it the following quotation seems germane:

“The present proceeding is not a new action to establish the rights of the defendant in error as against other parties. It is a proceeding in the nature of an execution to enforce *the judgment already rendered*. The right of the defendant in error to call upon the board of directors to enforce the judgment was established in that judgment as well as his right to have recourse to the board of supervisors in case of the refusal or neglect of the board of directors to make the levy and assessment. Neither the board of directors nor the board of supervisors nor the taxpayers of the Perris Irrigation District can be heard to defend the present proceeding on any of the grounds litigated, or which might have been litigated, in the former action.”

This decision has additional weight because the Supreme Court denied the petition to have the case heard by that court (p. 653.)

(c) Instead of bringing an action for a money judgment on these coupons, he could, without reducing his claims to judgment, have applied to the proper state court for a writ of mandamus, as his right to such remedy became complete, when the breach of the promise to pay occurred, and this mandate would have been available against the directors of the district to compel assessment to raise funds for paying these coupons, or, as we have seen, in the event of the neglect of the directors to levy such assessment, the writ would have been available against the county supervisors. (See Sec. 22, Wright Act—hereinbefore quoted from—*Barnes vs. Glide*, 117 Cal., 1; *San Francisco Savings Union vs. Reclamation District*, 144 Cal., 648.) The

last case holds that the right to mandamus becomes "complete and perfect upon the original refusal to pay the claims" (p. 648.) The amended complaint and supplemental complaint herein both allege refusal to pay these coupons (Trans., pgs. 28, 47,) and the court finds the issues in favor of the plaintiff. (Tr., p. 49.) However, demand and refusal are not essential in order to start the statute running here.

Barnes vs. Glide, 117 Cal., 1.

Bauserman vs. Blunt, 37 L. Ed. (U. S.), 316.

California Safe, Etc. Co. vs. Sierra Co., 158 Cal., 697.

Williams vs. Bergin, 116 Cal., 61.

Harrigan vs. Ins. Co., 128 Cal., 548.

Wittman vs. Board, 19 Cal. App., 231.

These features of the case at bar so very plainly distinguish it from such cases as the Sawyer and Freehill cases as to cause further comment regarding them superfluous.

### **Robertson vs. Blaine County.**

The case of Robertson vs. Blaine Co., 90 Fed., 63, was also cited by our opponents and it was contended that this case was similar to the present case. That case was decided by this court, some years before the Mather case and was brought to recover judgment against Blaine County, on bonds issued by Alturas County. The law under which those bonds were issued to meet the payment of the bonds, provided for a special tax which was to be collected as other taxes were collected and was to constitute *a separate fund and which*

*was to be used for no other purpose*, and all of the taxable property of the county was pledged for such payment.

The defendant county pleaded the section of the Idaho statute of limitations, covering actions brought upon *contracts in writing*. It appeared that after the bonds had been issued by Alturas County, a law was passed fastening the liability for their payment upon Blaine County.

The defendant argued that such law did not create a new liability, but that it was the old liability of Alturas County and therefore, the statute of limitations had run against the bonds. In referring to this argument, this court admitted the accuracy of the conclusions contended for, provided the argument, respecting the supposed *contractual* liability of Blaine County, had been correct and said:

“If this contention is sustained, it necessarily follows that as the bonds become due November 1, 1891, and more than five years elapsed from that date before the action was commenced, *the statute of limitations would apply.*”

The foregoing quotation contains a plain admission, which quadrates with the subsequent Mather case, that the statute would have run if the liability had been held a *contractual* one. This court however, held that the liability was not contractual, but one arising from operation of law, and consequently was an obligation *in the nature of a specialty* and hence the section of the statute of limitations pleaded did not apply. In other words,



the situation was just as though no plea of the statute had been interposed because the appropriate section had not been pleaded. This court said:

“The liability or obligation of Blaine county to pay the bonds and coupons issued by Alturas county did not, and could not, arise *except by legislative action.*” \* \* \*

“This debt, or obligation or whatever it may be called, *is in the nature of a specialty*, and, in our opinion, is not barred by the provisions of Section 4052 of the Revised Statutes of Idaho.”

But the statute does create the duty or obligation on Blaine county to pay the same, and “the obligation thereby imposed *is a specialty*,’ and *is not within the provisions of limitations pleaded herein.*” \* \*

“Under the law of Idaho, the statute of limitations may run against a specialty. Section 4054; p. 437, Rev. Stat. Idaho, reads as follows: ‘Within three years: (1) An action upon a liability created by statute, other than a penalty or forfeiture.’ But this action was commenced *within less than three years* after the act making Blaine County liable for the indebtedness of Alturas County was passed.” \* \* \*

“The liability of the defendant in either event is created by the statute, and the limitation, *and the only limitation which the defendant can plead*, must begin at or after that date, because that is the date when its liability first began.”

The Court then says that “the views already expressed *are conclusive upon the questions involved herein.*”

It is obvious, as the court had already conclusively

decided, that upon the existing facts and circumstances the pleaded statute of limitations did not fit the case, the later remarks of the court regarding the particular fund doctrine, were dicta—or at least were not material to the decision. How could they be material when the court had already held that the statute of limitations had not run because the liability of the defendant was *created by statute*, and the Idaho law prescribes a term of three years, for the barring of such a liability and it was undeniable the action had been commenced within a period less than three years? If, as the court held, the liability was not a contractual one, it was, we respectfully submit, immaterial to ascertain what the decision should be, if the character of the liability had been what the court held it was not.

It will also be noted that Judge Hawley, in the Robertson case, cites for the support of the views he expresses, regarding the particular fund doctrine, such cases as Lincoln County vs. Luning, Freehill vs. Chamberlain and Sawyer vs. Colgan, all of which cases were cited to this court in the subsequent Mather case and which it declined there to follow and which we have seen are conspicuously dissimilar to the case at bar.

It is, we submit, impossible to see any valid reason for permitting the remarks in the Robertson case, respecting the particular fund doctrine, to upset the later Mather case, which latter case was a California case and has been repeatedly cited and relied upon as authority, and in which case, it was directly held,—and not by language constituting a discussion upon a collateral

question—upon the point being squarely presented to this court, that the statute would run against municipal bonds, and where too the identical Section 337, C. C. P., was pleaded as it is pleaded in the case at bar. What logical ground can possibly exist for saying the well settled doctrine, that the federal courts will follow the decisions of the highest State court, on the subject of the statutes of limitations, should be ignored or that when a cause of action accrues, it has no effect upon the statute of limitations, or that when the California statute provides that there shall be no exception to the operation of the statute, this court should make one? The Mather case harmonizes with the decisions of the Supreme Court of California, which we have mentioned, and with all rules of logic and common sense and should not now be overturned upon the theory that the earlier Robertson case is discordant therewith, when it is very clear that the Robertson case turned upon an altogether different question, and the language of Judge Hawley, cannot, we submit, be applied to such an entirely different state of facts, as exist in the case at bar.

In *People vs. Winkler*, 9 Cal., 234, the court said:

“It is true that the language of that opinion, taken without reference to the circumstances of the case, would bear the construction contended for; but the rule is well settled, upon the soundest principles of reason, that the language of an opinion, in general, *must be held as referring to the particular case decided.*”

Furthermore, there is nothing in the Robertson or Luning cases, which suggests that either the Nevada or

Idaho statute of limitations contains any provision similar to section 312 of our Code of Civil Procedure, which we have previously quoted, and which provides that no unspecified exception shall be made to the operation of the statute, and if such statutory mandate does exist, it doubtless was not argued, hence what is said in the following cases would seem appropriate.

In *Franklin vs. Merida*, 35 Cal., 570, the court said:

“In each the court merely stated what it considered to be the rule, and the latter case, as the report shows, was submitted without argument. Such cases are far from satisfactory, and *are not to be received as conclusive of the law.*”

In *Ingraham vs. Gildermester*, 2 Cal., 161, the court said:

“Even if this court had given the construction mentioned to the act referred to, we would not be bound, on the doctrine of *stare decisis*, to follow it, *contravening, as it does, the plain letter of the statute.*”

See also *Golden Gate Mill and Mining Co. vs. Hendy Machine Works*, 82 Cal., 184, where the court says:

“There is nothing to the contrary in *Alpers vs. Schamel*, 75 Cal., 590. If there were, the decision would be *in direct conflict with the statute and would have to be overruled.*”

In the syllabus in *Cardenas vs. Miller*, 108 Cal., 250, it is said:

“The expression of opinion in the decision of a cause which is not necessary to a determination of the case is to be regarded as a mere dictum, and,



when it announces a doctrine which is inconsistent *with the plain meaning and effect of a statute, it cannot affect a subsequent decision in accordance with the statute.*"

In *Hart vs. Burnett*, 15 Cal., 609, the court says:

"The cases relied on were not decided, so far as the point we have been discussing goes—the leviable character of this title—upon 'solemn argument and mature deliberation;' and this seems to be one of the conditions by which Chancellor Kent qualifies the conclusive effect of the adjudication."

What is said in the foregoing cases is in point here, because it is clear that any decision on the subject of the statute of limitations, running counter to the *Mather* case, would also be in direct conflict with section 312, C. C. P.

### **Hewel vs. Hogin.**

These authorities apply with equal force to the case of *Hewel vs. Hogin*, 3 Cal. App., 248, which was decided by the District Court of Appeals for the third appellate district of California, and which case lacks the weight which would have been accorded to it, if a petition for hearing the case had been denied by the California Supreme Court, as no such petition was filed.

That was a case where an application for a writ of mandate was made, commanding the treasurer of the Modesto Irrigation District to pay interest on bonds.

What is said in that case, to the effect that the statute will not run, is dictum, for the reason that the statute was not pleaded and the court simply held there was no

abuse of discretion on the part of the trial court, in refusing the application of the defendant to amend his answer by pleading the statute. The application was not made until the trial and until after the plaintiff *had rested his case*. The court cites Sawyer vs. Colgan as authority although the two cases are as far apart as the poles, for, as we have seen in the Sawyer case, the plaintiff was remediless and could not sue the State, and no action lay against the State Treasurer Colgan, until he had money in his hands, for otherwise, he would have been held liable to suit for failure to perform an impossibility, consequently, the cause of action did not accrue until the money came into his hands.

In Hewel vs. Hogen, the court also indulged the misapprehension that as the bonds were not barred by the statute, the interest coupons were also not barred, and cites Meyer vs. Porter in support of this error, which case we have seen, has not only been explained by this court, in the Mather case, but has been also explained and discredited by the California Supreme Court (158 Cal., 690) and everywhere else.

In 25 Cyc. 1103, the law relative to interest coupons is succinctly and correctly stated as follows:

“Interest coupons of bonds, in the absence of some particular statute of limitations concerning them partake of the same nature as the bonds themselves and are subject to the same statute of limitations. But while this is true, it is held by the weight of authority that the right of action on the coupons accrues, and *the statute begins to run, at the respective dates of their own maturity, regard-*

*less of the time when the bonds mature, and whether the coupons have been detached and transferred or remain attached to the bond. It follows that if an installment of interest cannot be recovered by an action on the coupon, because barred by the statute, it cannot be recovered along with the principal in an action on the bond.''*

See also *Amy vs. Dubuque*, 98 U. S., 470; 19 Am. and Eng. Enc. of Law (2nd Ed.), p. 205.

It is evident *Hewel vs. Hogin* is not a well considered case, as it is diametrically opposed to the decisions of the California Supreme Court (*Barnes vs. Glide*, 117 Cal., 1; *San Francisco Sav. Union vs. Reclamation District*, 144 Cal., 643, and other cases we have cited), and it is impossible to reconcile it with Section 312, C. C. P. The case is clearly merely an authority to the effect that there was no abuse of discretion by the trial court in refusing the amendment, setting up the statute, and the decision cannot be twisted into holding that a cause of action on principal and interest coupons, similar to those involved here, did not accrue when such coupons matured. We might add that in the case of *Ham vs. Grapeland Irrigation District*, which we have already mentioned, Judge B. F. Bledsoe (now U. S. District Judge) refused to follow the *Hewel* case upon the subject of the running of the statute, although it was cited to him by the plaintiff *Ham*; and Judge Oster, of the San Bernardino County Superior Court, in the case of *Young vs. Alessandro Irrigation District*, likewise refused to follow it.

### **Gasquet vs. Board.**

The case of Gasquet vs. Board, etc. (La.) 12 South Rep., 506, is another case where the obligations were construed not to be *general* obligations, payable at a particular time, and where the court held that the holders of such obligations had no remedy to enforce payment, except when the funds, from which the obligations were payable, had been placed in the treasury—presenting a widely different case from this one, where the right to sue was complete upon the maturity of the coupons. In the Gasquet case, the court said:

“Act of 1873 makes it very clear that the claims evidenced by these certificates *were not payable absolutely or at any particular time.* They are payable *only* out of the revenues of the years for which they are issued and only when said revenues are collected \* \* \* The law deprived the claimants of *any legal remedy* to enforce payment, *except out of particular revenues, when actually collected* and converted into the treasury.”

So we might go on multiplying decisions which furnish numerous illustrations of cases where, at first blush, the facts and principles applied, might appear to bear some resemblance to the facts in the case at bar, and to the principles applied by the lower court, but when a careful analysis is made of such cases they will all be found lacking in showing adequate reasons for destroying the underlying elements, imbedded in our jurisprudence upon the subject of the limitation of actions. Nor will such cases, we respectfully submit, be found to vindicate the illogical hypothesis that, where a



state code inhibits the engrafting of an exception upon the statute of limitations and expressly prescribes the period within which suit can be brought upon a written instrument, it is still permissible to bring such suit years after the expiration of the specified period and to excuse such conduct by contending that the action is *sui generis* in that either (1) the cause of action has not accrued and therefore the statute has not run, notwithstanding it is also claimed the action is not premature; or (2) that the cause of action has accrued, and still the statute does not run, which necessarily involves creating an exception, to the operation of the statute, violating the plain terms of the code and effacing every elementary rule upon the subject, as well as overturning a multitude of decisions to the contrary.

### **Distinction Between "Right" and "Remedy."**

The unsound foundation upon which the entire fallacious theory of our opponents was attempted to be based is not far to seek. They became obsessed with the notion that the one and only reason, why the courts hold that the statute does run against such instruments as these, must be that as the writ of mandamus is generally available to the holder of such bonds, it enables him to compel the creation of the fund from which they are payable and precludes him from relying on the particular fund doctrine. So assuming, and also without warrant further assuming that these obligations were *special* obligations and payable *exclusively* from a fund—thus erroneously insisting that this was a "particular

fund" case—it was then contended in the lower court that as the writ of mandate is not usually available in the federal court before judgment, the supposed reason for the decisions, which hold that the statute runs, is eliminated and that therefore the rule should fall with the supposed reason.

As we have already observed, these notions present a clear case of a confusion of "right" and "remedy". It may not be questioned that the right to sue *for a money judgment* arose promptly upon the maturity of the coupons and therefore, the cause of action *then accrued* regardless of whether the forum to be entered was a state or a federal court. Because a plaintiff is compelled to obtain a judgment in the federal court, before the writ of mandate will issue, is manifestly no obstacle to the accrual of the cause of action. After he gets his judgment he may never need his writ, as money may by that time, be in the fund. If the fact that, in the federal court, a judgment is a prerequisite to mandamus, could by any possibility be deemed to prevent the right to sue from arising, it is equally clear, in such event, that the plaintiff never could get into the federal court. Such an argument, of course, is tantamount to putting "the cart before the horse" and results in rendering a federal court judgment absolutely unattainable. On the other hand, if the fact of such judgment being a prerequisite to mandamus does not preclude the right to sue arising, it is useless to contend that the cause of action has not accrued.

It is also clear that the same reasoning applies to the

bringing of an action in the State court. In such case, the plaintiff, in the absence of funds in the defendant's hands, upon the maturity of coupons, has the option of applying immediately for a writ of mandamus or of immediately commencing action for a money judgment.

Nevada National Bank vs. Supervisors, 5 Cal., App. 638.

Barnes vs. Glide, 117 Cal. 1.

S. F. Savings Union vs. District, 144 Cal., 649.

Whichever course he follows, *the cause of action must necessarily have accrued* or otherwise he would be unable to sue for either remedy and the action would be premature. He cannot remain idle, after the coupons have matured, for an undeterminate period of perhaps fifty or one hundred years or more, and say his action is not accruing or has not accrued, for the reason that he should be entitled to an unlimited period within which to speculate as to whether funds will be provided by the defendant with which to pay his claims when he gets his judgment or writ.

It is true that in S. F. Savings Union vs. Reclamation District, 144 Cal., 649, the court said:

“The only means by which the plaintiff could obtain payment of such a judgment would be by resort to the remedy which he had in the first instance,—that is to say, a suit in mandamus to compel the levying of an assessment whereby money could be raised with which to pay the same. But this remedy, as we have seen, has been long since barred.”

It is equally true however, that this language cannot

for a moment lend any color to the absurd idea that the court was discussing anything except one thing, viz: the subject of "remedy"—not right, nor the accrual of the cause of action. The remedy, mentioned by the court, was available to that plaintiff either before or *after* judgment, as we have seen that the writ of mandamus will issue in the State court *after* as well as before judgment, and there is absolutely nothing in the language quoted to suggest the untenable notion that all remedies are denied to a holder of coupons by the State courts, except the one remedy of applying for mandamus *before* judgment. The fact that a municipal corporation generally owns no property which can be taken by execution has nothing to do with the question as to when a cause of action accrues. All these matters relate exclusively *to the remedy*, and do not preclude a plaintiff suing on coupons for a money judgment, in any court in the land, as soon as the instruments mature, and as the right to sue *then arises*, we respectfully submit, the statute *then commences to run*, from which conclusion there is no escape unless the California code and all elementary rules be obliterated.

If the statute can be held nullified by the ruse of bringing suit in the federal courts, upon the theory that as a judgment is there a prerequisite to a writ of mandate, the statute cannot run, such a doctrine would be simply thwarting the statute by "mere strategy of proceedings," which, of course, cannot be done.

In 19 Am. and Eng. Enc. of Law (2nd Ed), 153, it is said:



“Neither the plaintiff nor the defendant will be allowed to thwart the ‘beneficent and healthful effect of a statute of repose’ by any ‘mere strategy of legal proceedings.’ ”

The theory of our opponent in the trial court was something akin to the notion indulged by the creditors of an insolvent corporation, who brought suit against its stockholders, in the case of Glenn vs. Dorsheimer, 23 Fed., 695, and insisted that, as no call had been previously made on the stockholders the statute had not run.

The court held that the statute had run against these creditors, and that *the fact that a judgment should be first obtained before the call were made* constituted no reason for saying the statute had not run, because the obtaining of the judgment was within the power of such creditors, and Judge Brewer said:

“These creditors *could have reduced their claims against the corporation to a judgment*, immediately after the assignment in 1866, through the simple processes of an ordinary action at law, *and then brought their bill* against the various stockholders to enforce payment here or elsewhere.”

So also in Glenn vs. Priest, 28 Fed., 907, Judge Brewer said:

“I cannot escape the conviction that *no mere strategy of legal proceedings* should enable a party to jump the lengthened space of eighteen years and destroy the beneficent and healthful effect of a statute of repose like the statute of limitations.”

See also Glenn vs. Dorsheimer, 24 Fed., 536.

So we say here, there was no obstacle whatever existing in any court in the country, to prevent these coupons being reduced to judgment as they severally matured, and after recovering such judgment, its holder could have availed himself of any appropriate method which existed to obtain the payment of such judgment. If it afterwards transpired that mandamus proved to be the only means by which such payment could be consummated, such a contingency plainly would not affect the accrual of the cause of action, as how or by what method such payment is finally effected is something entirely irrelevant to the question of the accrual of the cause of action. This is most obvious because, before the judgment has been obtained, it is impossible to ascertain in advance what the conditions will be—whether the necessary funds will then be in the treasury; or if not, whether the directors of the irrigation district will promptly levy sufficient taxes to pay the judgment, without necessitating a resort to mandamus; or, if the directors refuse to levy such taxes, whether the supervisors of San Bernardino county will make the levy in accordance with the Wright Act, etc.

In brief, all such questions are immaterial before judgment is obtained, and in *Herring vs. Modesto Irrigation District*, 95 Fed., 705, where irrigation bonds were sued upon, the court expressly said:

“It is immaterial, in determining the sufficiency of the complaint to consider *how the judgment in the suit may be enforced.*”

### Other Decisions Holding Statute Runs.

In addition to the statute and authorities already cited, there is abundant authority, upholding the fundamental principle, that the time of the starting of the running of the statute concurs with the accrual of the cause of action, to some of which precedents we invite the attention of the court.

In Goldman vs. Conway County, 10 Fed., 888, where suit was brought on county warrants, the court said:

“Where a county *is not liable to be sued on such warrants and cannot be coerced* to levy a tax for their payment, the statute probably would not run against them and the cases of Justices, etc. vs. Orr, 12 Ga., 137, and Carroll vs. Board, etc., 28 Miss., decided this and no more. But it is the settled law of this court that suit may be maintained on the class of warrants here sued on and that under Section 10 of the Article 16 of the Constitution of 1874, the county court may, by mandamus, be compelled to levy a tax not to exceed the limit prescribed by that section, to pay a judgment allowed thereon. Shirk vs. Polaski County, 4 Dillon, 209, and note.       \*       \*       \*

It is no answer to say the treasury of the county *never contained funds* to pay the warrants. They were a legal tender in payment of taxes; and it was open to the plaintiff by appropriate judicial proceedings, to compel funds to be placed in the treasury for their payment and the right of action accrued when the warrants were issued and *not when there were funds in the treasury* for their payment. Where a contract was made for work, payable out of a public fund, it was held that a statute began to run from

the time the work was completed, *although the fund was not raised*—Emery vs. Day, 1 Compton M. and R. Ex. 245,”

In Crudup vs. Ramsey, 15 S. W. (Ark.), 458, it is said in the syllabus:

“Being payable on demand, the statute begins to run against the warrants *from their delivery.*”

In Bodman vs. Johnson County, (Ia.), 88 N. W., 331, the court said:

“We think the distinction between the cases is that in the latter (Wetmore case) the county *had no means* of raising the fund out of which the interest could be satisfied, and therefore was not in default in payment, until there was money on hand, while in the case of the ditch fund, there is authority for making additional assessments until the expenses payable out of the fund are satisfied. (See Code Sec. 1950). Therefore, *it was the duty of the county to raise the necessary funds, and plaintiff was not justified in postponing the bringing of his action until such funds were actually on hand.*”

See also Thompson vs. Searcy Co., 57 Fed., 1036.

Wilson vs. Knox Co. (Mo.), 28 S. W., 897.

Pelton vs. Crawford, 10 Wis., 63.

Condon vs. City of Eureka Springs, 135 Fed., 566.

Bush vs. Stowell, 71 Penn., St. 208 (10 Am. Rep.), 694.

In Bauserman vs. Blunt, 37 L. Ed. (U. S.), 316, the court said:

“When a party knows that he has a cause of ac-



tion, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim or instituting such proceedings as the law regards sufficient to preserve it," and

"A person cannot prevent the operation of the statute of limitations by delay in taking action incumbent upon him," and "to permit a long and indefinite postponement would tend to defeat the purpose of statutes of limitation, which are statutes of repose, founded on sound policy, and which should be so construed as to advance the policy they were designed to promote."

In *Williams vs. Bergin*, 116 Cal., 56, the court said:

"The rule is well settled that when the plaintiff's right of action depends upon some act which he has to perform preliminary to commencing suit, and he is under no restraint or disability in the performance of such act, he cannot suspend indefinitely the running of the statute of limitations by a delay in performing such preliminary act."

In *Harrington vs. Ins. Co.*, 128 Cal., 531, in referring to the question when the cause of action of a creditor accrues, the California Supreme Court said:

"He cannot prevent the statute from running by failing to make the demand. (*Ball vs. Keokuk, etc. Ry. Co.*, 62 Iowa, 751). Whenever he can, if he chooses, by the terms of the contract, commence an action, *the cause of action has accrued*, for the purposes of the statute. (*Great Western Tel. Co. vs. Purdy*, 83 Iowa, 430; *Atchison, etc. R. R. vs. Burlingame*, 36 Kan., 628, 59 Am. Rep. 578.")

In Wittman vs. Board, 19 Cal. App., 229, the court said:

“Where a right has fully accrued except for some demand to be made as a conditioned precedent to legal relief, which the claimant can at any time make, if he so chooses, the *cause of action has accrued* for the purpose of setting the statute of limitations running.” (Citing cases).

See also First Nat. Bank vs. King, 57 Pac. (Kas.), 952; Kulp vs. Kulp, 21 L. R. A. (Kas.), 550.

The interest and installment coupons set forth in the complaint, amended complaint and supplemented complaint, and sued upon in this case, which we claim to be barred, amount to \$23,282.00.

The complaint was filed June 27, 1908. (Tr., p. 16). and the following is a list of the barred coupons sued upon in the complaint (Tr., p. 13) giving number of coupon, amount, date of maturity of each, number of coupons sued upon, and amounts barred, viz:

#### INTEREST COUPONS.

Coupon No.	Amount	Date of Maturity	No. of Coupons Sued Upon	Amount Barred
9	\$15.00	July 1, 1895	39	\$585.00
10	15.00	Jan. 1, 1896	48	720.00
11	15.00	July 1, 1896	48	720.00
12	15.00	Jan. 1, 1897	48	720.00
13	15.00	July 1, 1897	48	720.00
14	15.00	Jan. 1, 1898	48	720.00
15	15.00	July 1, 1898	48	720.00
16	15.00	Jan. 1, 1899	48	720.00
17	15.00	July 1, 1899	48	720.00
18	15.00	Jan. 1, 1900	48	720.00
19	15.00	July 1, 1900	48	720.00

20	15.00	Jan. 1, 1901	48	720.00
21	15.00	July 1, 1901	48	720.00
22	15.00	Jan. 1, 1902	48	720.00
23	14.25	July 1, 1902	48	684.00
24	14.25	Jan. 1, 1903	48	684.00
25	13.35	July 1, 1903	48	640.80
26	13.35	Jan. 1, 1904	48	640.80

Total.....\$12,594.60

### INSTALLMENT COUPONS.

1	\$25.00	Jan. 1, 1902	48	\$1200.00
2	30.00	Jan. 1, 1903	48	1440.00
3	35.00	Jan. 1, 1904	48	1680.00

Total. ....\$4320.00

Total amount of interest and installment coupons set forth original complaint that are barred..\$16.914.60

On December 29th, 1909, an amended complaint was filed (Tr., p. 17.), involving the same interest and installment coupons.

On July 5th, 1912, a supplemental complaint was filed (Tr., p. 42), adding a third count and for the first time bringing into the action, the following interest and installment coupons:

### INTEREST COUPONS.

Coupon No.	Amount	Date of Maturity	No. of Conpons Sued Upon	Amount Barred
8	\$15.00	Jan. 1, 1895	3	\$ 45.00
9	15.00	July 1, 1895	5	75.00
10	15.00	Jan. 1, 1896	4	60.00
11	15.00	July 1, 1896	4	60.00
12	15.00	Jan. 1, 1897	6	90.00
13	15.00	July 1, 1897	6	90.00

14	15.00	Jan. 1, 1898	6	90.00
15	15.00	July 1, 1898	6	90.00
16	15.00	Jan. 1, 1899	6	90.00
17	15.00	July 1, 1899	6	90.00
18	15.00	Jan. 1, 1900	6	90.00
19	15.00	July 1, 1900	6	90.00
20	15.00	Jan. 1, 1901	6	90.00
21	15.00	July 1, 1901	11	165.00
22	15.00	Jan. 1, 1902	11	165.00
23	14.25	July 1, 1902	11	156.75
24	14.25	Jan. 1, 1903	11	156.75
25	13.35	July 1, 1903	11	146.85
26	13.35	Jan. 1, 1904	11	146.85
27	12.30	July 1, 1904	11	135.30
28	12.30	Jan. 1, 1905	11	135.30
29	11.10	July 1, 1905	11	122.10
30	11.10	Jan. 1, 1906	11	122.10
31	9.75	July 1, 1906	11	107.25
32	9.75	Jan. 1, 1907	11	107.25
33	8.25	July 1, 1907	11	90.75
34	8.25	Jan. 1, 1908	11	90.75
35	6.60	July 1, 1908	59	389.40
Total.....				\$3287.40

### INSTALLMENT COUPONS.

1	\$25.00	Jan. 1, 1902	11	275.00
2	30.00	Jan. 1, 1903	11	330.00
3	35.00	Jan. 1, 1904	11	385.00
4	40.00	Jan. 1, 1905	11	440.00
5	45.00	Jan. 1, 1906	11	495.00
6	50.00	Jan. 1, 1907	11	550.00
7	55.00	Jan. 1, 1908	11	605.00
Total.....				\$3080.00

The total amount of interest and installment coupons



set forth in supplemental complaint that are barred amounts to \$6,367.40, making the total amount barred as set forth in the original, amended and supplemental complaints, \$23,282.00.

### **Cases No. 2492 and 2493**

Under the stipulation filed in this action, and in cases No. 2492 and 2493, it has been agreed that cases 2492 and 2493 may be decided upon the record in this case No. 2491. (Tr., pg. 144-147.) An order of court has also been made in each of the cases No. 2492 and 2493, they each may be heard and determined upon the record and briefs in this case No. 2491 (Tr., pg. 149-150). All three cases are upon the same issue of bonds, but involve different coupons of such general issues. Practically, the same questions are involved in each of the three cases. If the statute of limitation is held to be applicable to the case at bar, then under the the stipulation and order of court above referred to, the judgment in case No. 2492 should be reduced by \$61,759.85 on account of barred coupons sued upon in that case, and in case No. 2493 the judgment should be reduced by \$4367.00 on account of barred coupons sued upon in that case.

In case No. 2492, the complaint was filed April 18, 1908, and involved interest coupons No. 32, 33 and 34, and installment coupons No. 6 and 7, attached to 191 bonds. An amended complaint was filed November 22, 1909, upon the same interest and installment coupons. None of these coupons sued upon in the complaint and amended complaint are barred. But on July 5, 1912, a

supplemental complaint was filed, which for the first time, brought into the action interest coupons Nos. 21 to 31, both inclusive, and Nos. 35 to 40, both inclusive, and installment coupons Nos. 1, 2, 3, 4, 5, 8, 9 and 10, attached to 191 bonds. All of the foregoing interest coupons sued upon in the supplemental complaint, except Nos. 36 to 40, both inclusive, and all of the installment coupons, except Nos. 8, 9 and 10, were barred at the time of the filing of the supplemental complaint.

The following is a list of the barred coupons sued upon in the supplemental complaint in case No. 2492, giving number of coupon, amount, date of maturity of each, number of coupon sued upon and amount barred, viz:—

### INTEREST COUPONS.

Coupon No.	Amount	Date of Maturity	No. of Coupons Sued Upon	Amount Barred
21	\$15.00	July 1, 1901	191	\$2865.00
22	15.00	Jan. 1, 1902	191	2865.00
23	14.25	July 1, 1902	191	2721.75
24	14.25	Jan. 1, 1903	191	2721.75
25	13.35	July 1, 1903	191	2549.85
26	13.35	Jan. 1, 1904	191	2549.85
27	12.30	July 1, 1904	191	2349.30
28	12.30	Jan. 1, 1905	191	2349.30
29	11.10	July 1, 1905	191	2120.10
30	11.10	Jan. 1, 1906	191	2120.10
31	9.75	July 1, 1906	191	1862.25
35	6.60	Jan. 1, 1907	191	1260.60

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Total.....\$28,334.85

### INSTALLMENT COUPONS.

1	\$25.00	Jan. 1, 1902	191	\$4775.00
2	30.00	Jan. 1, 1903	191	5730.00
3	35.00	Jan. 1, 1904	191	6685.00
4	40.00	Jan. 1, 1905	191	7640.00
5	45.00	Jan. 1, 1906	191	8595.00

Total.....\$33,425.00

Making a total of \$61,759.85 of interest and installment coupons barred in the case No. 2492.

### Case No. 2493.

The complaint in this case was filed December 31st, 1910, and involved interest coupons No. 32 to 39, both inclusive, and installment coupons No. 6, 7, 8 and 9 attached to ten bonds.

An amended complaint was filed December 21st, 1911, and there was added to the cause of action interest coupons No. 13 to 31, both inclusive, and installment coupons, No. 1 to 5, both inclusive, on ten bonds.

All of the added installment and interest coupons sued upon in the amended complaint are barred.

A tabulated statement thereof being as follows:

### INTEREST COUPONS.

Coupon No.	Amount	Date of Maturity	No. of Coupons Sued Upon	Amount Barred
13	\$15.00	July 1, 1897	10	\$150.00
14	15.00	Jan. 1, 1898	10	150.00
15	15.00	July 1, 1898	10	150.00
16	15.00	Jan. 1, 1899	10	150.00
17	15.00	July 1, 1899	10	150.00
18	15.00	Jan. 1, 1900	10	150.00
19	15.00	July 1, 1900	10	150.00
20	15.00	Jan. 1, 1901	10	150.00

21	15.00	July 1, 1901	10	150.00
22	15.00	Jan. 1, 1902	10	150.00
23	14.25	July 1, 1902	10	142.25
24	14.25	Jan. 1, 1903	10	142.25
25	13.35	July 1, 1903	10	133.50
26	13.35	Jan. 1, 1904	10	133.50
27	12.30	July 1, 1904	10	123.00
28	12.30	Jan. 1, 1905	10	123.00
29	11.10	July 1, 1905	10	111.00
30	11.10	Jan. 1, 1906	10	111.00
31	9.75	July 1, 1906	10	97.50

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Total .....\$2617.00

#### INSTALLMENT COUPONS.

1	\$25.00	Jan. 1, 1902	10	\$250.00
2	30.00	Jan. 1, 1903	10	300.00
3	35.00	Jan. 1, 1904	10	350.00
4	40.00	Jan. 1, 1905	10	400.00
5	45.00	Jan. 1, 1906	10	450.00

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Total .....\$1750.00

Making a total of \$4367.00 of interest and installment coupons barred in case No. 2493.

#### Point II.

The court erred in rendering said judgment for the reason that none of the bonds bore date at the time of their issue, as required by the statute authorizing the issue of bonds by plaintiff in error, and none of said bonds ran, by their terms, for the length of time they were required to run by the provisions of said statute (Subdi-



visions (a) and (b) and (g) of Specification 9, Tr., p. 129.)

The stipulation, entered into by the parties in this action, covering certain facts agreed upon, is set forth on page 52 of the transcript, and among other things recites:

“That the first delivery of bonds made by said district was made to the Semi-Tropic Land and Water Company, in December, 1890, being a delivery of three hundred bonds, and being bonds numbered one to three hundred inclusive; that *the next delivery of bonds made by said District was made in May, 1892, or shortly thereafter*, under the contract of date May —, 1892, hereinafter set forth.”

None of the bonds to which belonged the coupons herein sued upon, with the exception of three bonds numbered 77, 78 and 234, were embraced within the three hundred bonds delivered in December, 1890. (Trans., pgs. 26, 45,) and, with respect to the three bonds mentioned, it is plain even they were not delivered upon the date they bore, as every bond was dated November 17th, 1890. (Tr., p. 22.) All of the other bonds sued upon herein were delivered long after the date they bore, as appears from the stipulation quoted.

The Wright Act, as we have seen, is a mandatory one and section 15 thereof (Cal. Stat., 1887, p. 36) provides that the bonds “shall be numbered consecutively as issued, and *bear date at the time of their issue.*”

The question arises as to the meaning of the words “issue” and “issued” as used in the Wright Act.

Respecting this question, in Sechrist vs. District, 129 Cal., 640, the California Supreme Court said:

“But it cannot be maintained that the bonds were issued, in the sense of the statute, until they were *delivered for a valuable consideration*. It was said in Brownell vs. Greenwich, 114 N. Y., 518, speaking of certain bonds in litigation: ‘They bear the date of March 25, 1871, and are presumed to have been executed at that time, but executing is not issuing, for they may be fully executed *but never issued*. \* \* \* The bonds had no legal inception, and could not become valid obligations, aside from any other question, *until actually delivered for a valuable consideration*. Under the circumstances, we think that the delivery of the bonds to the plaintiff *determines the date* when his bonds were *issued*. The Wright Act provides in section 15 that the ‘bonds shall be numbered consecutively *as issued* and bear date *at the time of their issue*; and section 16 provides that ‘the board shall sell said bonds *from time to time*, in such quantities as may be necessary and most advantageous, to raise money for the construction of said canals and works, the acquisition of said property and rights, etc. These provisions clearly contemplate *successive acts* which *from time to time* may require *the issue of bonds as the work progresses*.’”

See also Wright vs. East Riverside Irr. District, 138 Fed., 315, in which case Judge Wellborn held in the lower court that the bonds there involved were issued when delivered. Austin vs. Valle, 71 S. W. Rep., p. 414; Clark vs. Los Angeles, 150 Cal., 46; Merced

River Electric Co. vs. Curry, 157 Cal., 727; Connelly San Francisco, 164 Cal., 101.

If then the time of delivery is the time of the issuance of the bond, it is plain that the term during which the bond shall run is intended by the legislature to commence at the date of its issuance, as that is the date which the statute says the bond shall bear, and yet every bond here specifies that the date of its maturity shall be so many years *from its date*, which date was long prior to its issuance. If the period of maturity, by the system of antedating can be legally shortened to this extent, it would be equally permissible to have issued these bonds one day before the date of maturity, by causing them to bear a date a sufficient number of years prior to the specified time of maturity. It is apparent the legislature never intended that an irrigation district should be subjected to the burden of having to pay a bond one day after its issuance.

Ordinarily a bond or note, in order to be valid, is not required to be truly dated, or even dated at all; nor to be in any particular form, negotiable or not negotiable; nor to run for any specified term. But the defendant has *no power* to issue bonds, except as derived from the Wright Act; and that act expressly provides that the bonds therein authorized *shall* "bear date at the time of their issue," and that they *shall* run for a specified term. These provisions are limitations upon the power granted. The defendant is authorized to issue only such bonds as are provided for by the statute. The amount, in number and value, may be determined by

the district; and the form, in so far as not inconsistent with the statute or general law, is discretionary; but in so far as the form is prescribed, there is no room for discretion, *no power* but to follow the requirement.

In *Anthony vs. County of Jasper*, 101 U. S., 697, a suit upon interest coupons by an innocent holder, the court said:

“There can be no doubt that it is within the power of a State to *prescribe the form* in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability. \* \* \* As against a bona fide holder, the public is bound by what its authorized agents have done and stated *in the prescribed form*. Dealers in municipal bonds are *charged with notice* of the laws of the State granting power to make the bonds they find on the market. ‘This we have always held.’”

In *People’s Bank vs. School District*, 3 N. Dak., 496 (28 L. R. A., 644), bonds had been issued under a statute authorizing their issuance for a term not less than ten years, but the bonds in question, by their terms, ran for eleven days less than ten years. The bonds were held void for want of power to issue them. The court said:

“It is elementary that power to issue such municipal securities is derived wholly from statute. The statute may *prescribe the conditions* on which such power shall be exercised. It may also declare *what terms shall be embodied in the bonds* it authorizes to be issued. The donee of the power must take it burdened with all the statutory require-



ments, as well with respect to the *terms* of the bonds to be issued as with regard to the conditions on which they may be issued. The statute authorizing defendant to issue bonds provides that they 'may be made payable in not less than ten nor more than twenty years from their date.' The bonds which were issued under this power were dated September 12, 1884, and were in terms payable September 1, 1894. They were therefore, made payable in less than ten years from their date. We do not see how such a bond can be regarded as being *authorized* by the statute. There is no more *power* to issue bonds payable eleven days less than ten years from date than nine years less. If the question is to depend upon the magnitude of the departure from the statutory requirement, it will be impossible to know where to draw the line. If we ought not to draw it at the period of eleven days, on what principle can we draw it at thirty days, or six months, or a year? Authority to issue bonds payable in not less than ten years from date is not authority to issue them payable *in less than ten years.* \* \* \* Plaintiff cannot derive any benefit from its claim that it is an innocent purchaser, because, under all the authorities, even bona fide purchasers of such securities are charged with knowledge of the terms of the statute under which the bonds are issued."

The principle declared in that case would have been the same whether the bonds had run eleven days less than ten years or eleven days more than ten years. The defendant simply had no authority, no power, to make them for either a shorter or a longer term than that prescribed in the statute.

In Norton vs. Town of Dyersburg, 127 U. S., 160, bonds had been issued payable in ten years from date, which was a *longer* period than that authorized by the statute. They were held void for that reason.

In Barnum vs. Okolona, 148 U. S., 393, the statute authorized the issue of bonds, to run not more than ten years. Bonds were issued (apparently under an honest misconception of the law applicable), to run from eleven to seventeen years. All were held void, as being in excess of the power granted, and without reference to the magnitude of the departure. The court, referring to the provision of the statute that they should run not exceeding ten years, said that “such limitation must be regarded as in the nature of a *restriction on the power* to issue bonds;” and in conclusion said:

“Our conclusion, upon the whole case, is that the Town of Okolona had *no power* to issue the bonds in suit.”

And in the opening paragraph of the opinion in that case, the court declared the general rule, as follows:

“That municipal corporations have *no power* to issue bonds in aid of a railroad, except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it *authority* to issue negotiable bonds except *subject to the restrictions and conditions* of the enabling act,—are propositions so well settled by frequent decisions of this court, that we need not pause to consider them.”

Under the Wright Act, the defendant was authorized to issue bonds that should bear date *at the time of their issue*, that should be negotiable in form, and be made payable in a specified time. The defendant had no authority to issue any other kind or form of bond. The true date was by statute made an *essential part* of the form of the bond. As the bond was to run for a specified term, neither more nor less, from the time of issue, a false date would vary that term, would make it shorter or longer than the statute prescribed. If the defendant had power to insert a false date in the bond, then it would have power, by falsely dating the bond, to make it run from the time of issue, for either a shorter or a longer term than that prescribed—a power that the statute clearly did not intend to grant.

In the case of *Wright vs. East Riverside Irrigation District*, 138 Fed., 322, before this Circuit Court of Appeals, the bonds involved bore date at the time of their authorization, but were not disposed of till later. It was contended by the plaintiff that the bonds were issued when authorized by the resolution, and by the defendant that they were not issued until disposed of. After holding that the bonds *if* regarded as issued at the time of their date, were void because not signed by the proper person as secretary, the court said:

“On the other hand, treating the bonds as having been issued at the time of their disposal, and when McCully was in fact secretary, they equally failed to conform to those other *essential provisions* of the statute, declaring they shall *bear date at the time of their issue*, and be payable in installments at

*the various times therein fixed.* In that view, they are ante-dated, the *direct and necessary effect of which* is to make them payable within a *shorter time than is provided by the statute* for their payment, which provision is, as a matter of course, of the *essence of the law, and not a mere matter of form.*"

These conclusions are merely based on general law, and by greater reason they are applicable in the case at bar, where they are supported by a mandatory statute, declaring "absolutely void" all bonds issued "in excess of the express provisions of the act." (Sec. 42.) These bonds are not only issued in excess of those provisions, but in flagrant violation of them.

It will also be noted that these bonds upon their face, recite that "the said bonds are by said act of the legislature, *made a lien upon all said real property.*" (Tr., p. 22,) and Section 12 of the Wright Act provides that, if the district purchases property of a specified character, the bonds may "be used at their par value *in payment.*"

In case of *O'Neill vs. Yellowstone Irrigation District* (Mont.), 121 Pac., 283, the Montana Supreme Court said:

"It is said that the word "issued," as used in the statute, has reference to the date of actual delivery to the purchaser, and hence the view contended for must obtain. We agree with counsel that the word "issue," as here used, means the delivery of the bonds to the purchaser, and has no reference to the arbitrary date fixed as the beginning of the time for which they run. The word "issue," used in connection with bonds, notes,



etc., sometimes, and perhaps generally, refers to this date; but *evidently bonds cannot be a lien upon the property of the obligor until they have been delivered, nor can they be issued directly in payment and in satisfaction of a contract without actual delivery.* Hence we conclude that the term, as here used, refers to the *actual delivery* or emission of the evidences of indebtedness."

It will also be noted that the Wright Act provides that "the board may sell said bonds *from time to time*, in such quantities as may be necessary and most advantageous, to raise money," etc., which clearly contemplates the delivery of bonds at different dates, and section 42 of the act also provides that "the board of directors, or other officers of the district, shall have no power to incur any debt or liability whatever, either by *issuing* bonds, or otherwise, in excess of the express provisions of this act," etc.

Now it would be impossible to incur liability, by *issuing* bonds, if they were not delivered—clearly showing that the word "issuing," as used in the act, is used in the usual and well accepted sense and embraces delivery of the bonds.

Although the bonds involved in the case of *Stowell vs. Rialto Irrigation District*, 155 Cal., 222, were held valid upon the facts as then presented, and the dates upon the coupons were held in harmony with the term specified by law, during which the bonds should run, thus overcoming the nominal date stated in the bond itself, yet the particular question here involved was not apparently considered and decided by the court, as the

court there considered the question whether those bonds *were void upon their face* by reason of the discrepancy existing between date of the coupons and the date of the bond, as appears (page 221) from the following language:

“The respondent makes the further contention that apart from the manner in which they were exchanged, the bonds are *void upon their face*.”

The court then proceeds to the consideration of *that question*, but the court also recognizes the rule that where the statute has fixed the term for which the bonds shall run, bonds, in which payment is undertaken at the expiration of a shorter period, are invalid and the court says:

“The power of public corporations to issue bonds is to be exercised in the manner prescribed by statute. ‘There can be no doubt that it is within the power of a State to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability.’ (Anthony vs. County of Jasper, 101 U. S., 693.) *Where the statute has fixed the term for which bonds shall run, bonds in which payment is undertaken at the expiration of either a shorter* (People’s Bank vs. School District, 3 N. Dak., 496), (57 N. W., 787), *or a longer term* (Norton vs. Town of Dyersburg, 127 U. S., 160;) Barnum vs. Okolona, 148 U. S., 393; (13 Sup. Ct., 638), than that authorized are invalid.”

Stowell vs. Rialto Irr. Dist., 155 Cal., 222-223.

It will be seen that in the Stowell case, the court does not discuss the question, as to whether such bonds can

be sold and delivered years after the date they bear and still be valid obligations of an irrigation district, notwithstanding such antedating.

Apparently, many of these bonds were not in existence until after January 1st, 1891, for the defendant in error testifies that he waited for the bonds "till away in January. They didn't get them printed till January, ready for delivery and so I didn't get them in advance", etc. (Tr., p. 64).

On pages 56, 57 and 60 of the transcript appears a statement of the different times of the various deliveries of the bonds.

### **Point III.**

The court erred in rendering said judgment and findings herein, for the reason that many of the bonds were issued for a consideration which, wholly or in great part, consisted in the doing of construction work for the defendant in error and for the reason that none of said bonds was ever lawfully issued. (Subdivisions (e), (f), and (h) of Specification 9—Trans., pgs. 129, 130.)

Some of these bonds were delivered to the defendant in error under his contract made by him with the district on Jan. 2nd, 1895. (Tr., p. 57.)

A copy of this contract is set forth on pages 115 to 118 of the transcript. It will be seen that this contract provides that:

"Upon each \$5000 worth of pipe when made at yard there shall be paid said Stowell \$3000 in bonds at par. Thirty-five days after the completion of laying of each successive mile of pipe, the balance

due upon such mile shall be paid.” (Trans., p. 117.) \* \* \*

“IT IS UNDERSTOOD AND AGREED that all pipe heretofore furnished or constructed, or to be furnished or constructed for the Rialto Irrigation District or pipe system, and not heretofore deeded to said district, *shall remain and be, the property of A. W. Stowell* until the bonds received, or to be received therefor, shall have been paid.” (Tr. p. 118.)

These provisions clearly show that the district was to issue bonds to the defendant in error, in installments, under this contract, to be applied on account of this material, viz: the pipe he was making. In fine, it is undeniable, that under this contract the district issued bonds to the defendant in error, *before it received the consideration therefor*. This feature brings the case within such precedents as *Hughson vs. Crane*, 115 Cal., 404; *Stimson vs. Alessandro Irrig. Dist.*, 135 Cal., 389; *Leeman vs. Perris Irr. Dist.*, 140 Cal., 540. These cases are unshaken by the case of *Stowell vs. Rialto Irr. Dist.*, 155 Cal., 215. The last case differentiated the situation there existing from the precedents mentioned, upon the theory that in the *Stowell* case, the bonds were issued for completed structures and other property and *contemporaneously with the passage of the title to that property to the Irrigation District*, and referring to this, the Court says:

“So long as it did not *issue* any bonds *until it received, as consideration therefor*, the property which it had a right to buy for bonds, we see no objection to a contract by which it bound itself, in the fu-



ture, to take and pay for water-rights not yet developed and works not completed at the date of the contract. By the use of the words "works constructed and being constructed" the legislature clearly indicated its intention to authorize districts to negotiate for water systems in advance of their total completion. In no event was their any obligation under this agreement to accept anything but developed water-rights and completed pipe-lines, nor a duty to deliver bonds *except upon transfer of such rights and lines.*"

The court was, in the last quotation, referring to the contract made by the district with the Semi-Tropic Land and Water Co. (See Tr., pgs. 73, 83.) It is clear therefore that the decision is no authority upon any proposition decided in the precedents we have cited. It will also be noted that in the last quotation the word "issue" bears the meaning for which we contend.

Under this contract of January 2nd, 1895, (made by the defendant in error with the district (Tr., p. 115), in violation of the provisions of the Wright Act, the district issued bonds *before* it received any property therefor and it became its duty to deliver those bonds *before* any transfer of such property was made to the district. We submit, therefore, that all of such bonds, so issued, were void. These bonds are sued upon in the case at bar and in order to prevent all of the bonds, herein sued upon, being held void, it is incumbent upon the defendant in error to plainly segregate the bonds issued under the contract mentioned, prior to delivery of the property therein contracted for. (See Edwards vs. Bates

County, 117 Fed., 533.) These particular bonds were not only wrongly dated but were issued in such a manner that they are void under the decisions mentioned for additional reasons (See *Hughson vs. Crane, supra*; *Stimson vs. Alessandro, supra*, and *Leeman vs. Perris Irr. Dist., supra*.)

It would also plainly appear here that under this mandatory enabling act, these bonds, if originally invalidly issued, remain void in the hands of every holder, regardless of the circumstances under which they were acquired.

### **These Bonds are Void and Unenforceable, Regardless of How the Holder Acquired Them.**

We again invite the attention of this court to the stringent and mandatory provisions of section 42 of the Wright Act (statutes 1887, p. 44), wherein the legislature, in no uncertain terms, provides that:

“The board of directors, or other officers of the district, *shall have no power* to incur any debt or liability whatever, either by issuing bonds, or otherwise, *in excess of the express provisions* of this act, and any debt or liability incurred, in excess of such express provisions, *shall be and remain absolutely void.*”

It is obvious—and the English language could not express anything more clearly—that by these provisions the directors of an irrigation district are unequivocally shorn of all *power* to issue bonds, or incur any liability whatever, except as provided by the act, and in the event of their attempting to incur any liability in excess

of those provisions, it is further clearly specified that such liability “shall be and *remain* absolutely void.” Let it be noted this is not a declaration merely that such liability shall, at the time of its being incurred, be absolutely void, but the legislature *ex industria* use the word “remain” and expressly declare that such liability shall *remain absolutely void*. Here we submit there is no room for construction, as the legislature has spoken so clearly and has reiterated the same statement in the subsequent amendments to that act (see statutes 1891, p. 147, and 1897, p. 275.) The word “remain” is defined in the International Encyclopaedic Dictionary as follows: “To *continue* or *endure*, in a particular state, form or condition; to *continue* or *endure* generally; to *survive*.”

Notwithstanding such distinct language, the learned trial court in effect held that the permanent result of transgressing the limitations of the act, so transparently dictated by the legislature, would not follow at all, provided the void bond were transferred to a person without notice of its infirmity. Such reasoning irresistibly leads into an intellectual fog. In other words, it is nothing more nor less than asserting that a thing, which has been expressly and *permanently* deprived of life by the fiat of the legislature. will spring into life upon being transferred to a new holder; it is nothing more nor less than saying that the word “remain” does not convey the meaning alike attributed to it by the lexicographer and by the wayfaring man, viz: the state of *enduring*, *continuing*, or *surviving*, but, on the contrary,

it should be interpreted to mean just the opposite. There is no escape from such an illogical position, for how can it be said that voidness *endures* or *continues* if a transfer ends it? or that it *survives* such transfer if such state of voidness is, in the hands of a transferee, turned into a state of validity? or how can it be said that a thing *remains* "absolutely void" if it is void in the hands of one person and valid in the hands of another?

It will be seen that section 42 of the Wright Act is undeniably a curtailment of the *power* of an irrigation district, as that section specifically provides that the directors "shall have *no power*" to transcend to inhibition. It will not do, therefore, to argue that an infraction of this clause is a mere "irregularity;" on the contrary, it is a question of *want of power*, and whenever the district attempts to overstep the circumscribed area, within which it is permitted and only permitted by this enabling act, to exercise the limited powers conferred upon it, then, by the express terms of the statute, it is palpably and distinctly confronted by *lack of power*.

We respectfully submit that although it may sometimes be difficult to distinguish the difference between what is an "irregularity" in the exercise of power conferred, and what constitutes "want of power," yet with reference to the Wright Act, it is clear no such difficulty can arise, because the legislature has so unmistakably manifested what its intention was in the premises, and has unequivocally said that an irrigation district *has no power* to issue bonds by the method or in the manner under which these bonds were issued, and that bonds so



issued are not only absolutely void when issued, but shall thereafter *remain* absolutely void, and the inevitable result therefore is that, under this statute, the defendant in error is precluded from seeking refuge behind the theory that he is a purchaser for value without notice of any irregularity in the issuance of these bonds, because this is not a case of "irregularity," but a case where there is *a total want of power* to do what section 42 of this enabling act says the district "shall have *no power*" to do.

In the case of *Sutro vs. Petit*, 74 Cal., 332, the bonds there involved disclosed on their face, nothing to indicate invalidity and the plaintiff appears to have been a bona fide purchaser for value. Interest had been paid on those bonds for about thirteen years and the bonds there, as here, referred to the act under which they were issued. The court said:

"The power to issue the bonds, and the limitation of that power, depend wholly upon the *language of the act itself*, and not upon any extrinsic contingency. There was nothing left to the discretion of the officers, as in the case of *Porter vs. Haight*, 45 Cal., 631, nor was there any authority to do what 'might appear to them advantageous to the county,' as in *Nevada Bank vs. Steinmitz*, 64 Cal., 301.

"*Neither can the doctrine of estoppel*, or of ratification, or of bona fide holding, be successfully invoked by respondents. Those doctrines can be invoked against municipal corporations—if at all—*only* in cases of informality, irregularity, etc., on the part of an authorized agent. (*Dillon on Municipal Corporations*, 3d ed., secs. 457, 463, 511-

553, and cases cited). Where there is a total *want of authority* to issue municipal bonds, there *can be no bona fide holding of them.*' (Town of East Oakland vs. Skinner, 94 U. S., 255.) It is clear—in this State at least—that the issuance of bonds is not within the scope of the general and ordinary powers of a board of supervisors, and that such bonds can be legally issued only by virtue of express authority of the legislature. (Dillon on Municipal Corporations, Secs. 485, 507, and cases there cited; Lindon vs. Case, 46 Cal., 172; Wallace vs. Mayor of San Jose, 29 Cal., 181; El Dorado County vs. Davidson, 30 Cal., 521; Robinson vs. Supervisors of Sacramento, 16 Cal., 208; Foster vs. Coleman, 10 Cal., 281; People vs. Supervisors of El Dorado County, 11 Cal., 170.) The bonds in question, therefore, were issued without any authority at all, and are wholly void. And the action of the board of May 4, 1885, ordering these bonds to be redeemed, was of course, of no value. The character of one void act of public officers cannot be changed by a second void act of the same officers, declaring the first act to be valid.

"It is quite probable that the respondents paid full par value for these bonds, and that they will lose their money. But 'those who contract with a municipal corporation are bound to know the extent of the power of its officers.' (Wallace vs. Mayor of San Jose, *supra*.) Respondents would have discovered the worthlessness of the bonds upon the slightest inquiry. At all events, hard cases cannot be allowed to make bad law. An over-issue of twenty thousand dollars would have been no less valid than the over-issue of two thousand

dollars; and any other rule would put the people of a county in the complete power of careless or unscrupulous public officers."

Sutro vs. Pettit, 74 Cal., 336, 337.

It will be observed in that case, the court points out there was by the act there involved, nothing left to the discretion of the county officers, but the power depended wholly upon the language of the act itself; this we submit, is the precise situation in the case at bar, for it is patent the power of an irrigation district to issue bonds is limited by the Wright Act. The directors of such district are not vested with any discretion to determine any extrinsic fact whatever, but are only able to exercise certain powers, for certain purposes, under express restrictions, and the "mode is the measure of the power" so given.

"Where the act authorizing a town to borrow money to pay for the stock subscribed expressly provided that the officers thereof should '*have no power*' to do so until the written assent of two-thirds of the resident taxpayers had been obtained, this was held by the Court of Appeals of New York to be a condition precedent, without which the power did not exist."

Dillon on Municipal Corporations (4th Ed.), section 550.

"If the statute authorizes such a corporation to issue its bonds *only* when the measure is sanctioned by a majority of the voters, bonds issued without such a sanction (either in fact, or according to the decision of authorized officers, or some authorized body or tribunal), or when voted to one corporation

and without authority of law, issued to another, are void, *into whosoever hands they may come*. This is the sound and true rule of law on this subject, and the one which has had the uniform approval of the State courts in this country, and it has also received the high sanction of the Supreme Court of the United States. The distinction, however, must be remembered, between *want of power* to issue the bonds and *irregularities* in the exercise of the power, which latter are unavailing against the bona fide holder without notice of the irregularity.

Dillon on Municipal Corporations (4th Ed.), section 553.

See also McCoy vs. Briant, 53 Cal., 247.

Lehman vs. City of San Diego, 73 Fed., 108.

Hewit vs. Normal School District, 94 Ill., 531.

We reiterate that there was here no mere "irregularity in the exercise of power" on the part of the appellant in issuing these bonds, as it is obvious that to so hold would be indulging in a legal solecism, for how can there be an irregularity *in the exercise of a power*, which alleged power section 42 of the enabling act distinctly declares is non-existent?

See Wells vs. Supervisors, 26 L. Ed., (U. S.) 124.

And Barnum vs. Okolona., 37 L. Ed., (U. S.) 497.

In Marsh vs. Fulton County, 19 L. Ed., (U. S.) 1042, the U. S. Supreme Court said:

"But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact,



we do not perceive how it could affect the validity of the County of Fulton. This is not a case where the party executing the instruments possessed a *general* capacity to contract, and where the instruments might for such a reason be taken without special inquiry into their validity. It is a case where the power to contract never existed—where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. *The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder.* This is the law, even as regards commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of Floyd's Acceptances (*ante*, 173). In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: 'In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards, for it is to be kept in mind that the protection which commercial usage throws around negotiable paper *cannot be used to establish the authority by which it was originally issued.*'

So we say here the appellant possessed no *general capacity* to issue bonds; on the contrary, "An irrigation district is a public body, and under the Wright law

*has only such powers* as are given to it by that act. Such powers are enumerated in the act."

Stfmson vs. Alessandro Irr. Dist., 135 Cal., 392.

See also Young vs. Township of Clarendon, 33 L. Ed., (U. S.), 360.

Pierce vs. U. S. Bank, 19 L. Ed. (U. S.), 173.

And Von Schmidt vs. Widber, 105 Cal., 157.

"It may be stated generally that where special powers for the accomplishment of a particular purpose are conferred by statute upon corporations or individuals, the acts conferring such powers are to be construed strictly, and the powers cannot be exercised for any collateral purpose."

26 Am. and Eng. Enc. of Law, (2d Ed.), p. 665.

"Every dealer in municipal bonds which upon their face refer to the statute under which they are issued is bound to take notice of the statute and of all its requirements."

McClure vs. Oxford Twp., 94 U. S., 429.

National Bank of the Republic vs. St. Joseph, 31 Fed. Rep., 216.

"Want of power is always a good defense to an action on municipal bonds. Such bonds issued without authority are *absolutely void*. This want of power generally arises from one of the following causes:

(1) Because the bonds are used for a private and not a public use.

(2.) Because the enabling statute is in violation of some constitutional provision.

(3) *Because the power exercised is different from that delegated.*

(4.) Non-compliance with conditions imposed by the enabling act.”

In notes, 15 Am. and Eng. Encyc. of Law, (1st Ed.,) 1292.

See also *Aurora vs. West*, 22 Ind., 89.

**It is Well Settled that When Negotiable Paper is Expressly Made Void by Statute, it is Void in the Hands of Every Holder.**

This rule is particularly applicable where such paper is declared by law to be *utterly* void or, as is the case with reference to the Wright Act, (Sec. 42.) *absolutely void*.

In *Vallett vs. Parker*, Vol. VI., Wendell's Reports, p. 619, the court said:

“Whatever doubts may have heretofore existed, I take it to be well settled, that as between the original parties to a promissory note, the defendant may show either the want of consideration, or the illegality of it. But when a negotiable instrument has passed in the ordinary course of business into the hands of a *bona fide* holder for valuable consideration, and without notice of the consideration, the general rule is, that the defendant cannot avail himself of any such defence. There are exceptions; two instances are familiar; the case of a note given upon an *usurious* consideration, or for money lost *by gaming*. In both these cases, the notes and securities are declared by the statute to be *absolutely void*. Every man, therefore, who takes an endorsed note, does so at his peril, so far as those con-

siderations may have entered into the original concoction.”

The following authorities are decisive upon this question:

Barnes vs. Lacon, 84 Ill., 461.

Town of Eagle vs. Kohn, 84 Ill., 292.

Richeson vs. People, (Ill.) 5 N. E. Rep., 123.

Woodson vs. Barrett, (Va.), 3 Am. Dec., 612.

Haight vs. Joyce, 2 Calif., 64.

Alabama Nat. Bank vs. Parker, (Ala.,) 40 South, 987.

Snoodys vs. Bank (Tenn.) 7 L. R. A., 804; 8 Cyc., 47.

Ward vs. Sogg, 24 L. R. A., 281, (N. C.)

Glenn vs. Farmers Bank, 70 N. C., 191.

Third Nat. Exchange Bank vs. Smith, 125 Pac., 633.

Randolph on Commercial Paper, Sec. 517.

Tiedman on Commercial Paper, Sec. 178.

In section 44 of Burroughs on Public Securities, it is said:

“And while it is true that municipal bonds with coupons attached are commercial paper and pass by delivery, so that a *bona fide* holder is not required to take notice of conditions upon which they are issued, or of resolutions on the records of the railroad company; yet when the statute expressly declares that negotiable securities given under certain circumstances shall be void, the court will hold them void, even in the hands of a *bona fide* purchaser without notice.       \*       \*       \*

It is not the illegality that makes the defence



valid, without notice of the illegality; it is by force of the peremptory words of the statute declaring them void, that they are held to be void in the hands of an innocent endorsee without notice. \*

\* The illegality which constitutes the want of power in this class of cases, arises not merely from the fact that certain acts are conditions precedent to the issue, but from the declaration of the statute that they *shall not be valid* until the acts are done, or that they shall *be void* if the acts specified are not performed. It is the imperative command of the statute that stamps its impress of invalidity on the bonds."

"The *bona fide* holder for value who has received the paper in the usual course of business is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral turpitude, which are termed *mala in se*, and those founded in positive statutory prohibition which are termed *mala prohibita*. The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect. There is, however, one exception to this rule; that when a statute expressly or by necessary implication, declares the instrument *absolutely void*, it gathers no vitality by its circulation in respect to the parties executing it; though even upon such instruments an indorser may, as we shall hereafter see, be held liable.

"There are few cases in which the statute renders such instruments *absolutely void*; and the most

important, if not the only instances now to be met with, are the statutes against usury and gaming.”

Daniel on Negotiable Instruments, Sec. 197.

“There are some defenses which are as available against a *bona fide* holder for value, and without notice, as against any other party. They are those which go to show that the instrument was *absolutely* and *utterly* void, and not merely voidable (1) by reason of the incapacity of the party assuming to contract; or, (2) by reason of *some positive interdiction of law*; or, (3) by reason of the want of consent of the party sought to be bound to the particular contract.”

Daniel on Negotiable Instruments, Sec. 806.

“A *bona fide* purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin, *unless it is absolutely void for want of power* in the maker to issue it, or its circulation is by law prohibited. Municipal bonds, payable to bearer, are subject to the same rules as other negotiable paper.”

Dillon's Municipal Corporations, Section 513.

In Bayley vs. Taber, 5 Mass., 290, the court said:

“The statute of 1804, C. 58, section 1, enacts that all bills, notes, checks, draughts or obligations whatsoever, under the amount of five dollars, payable to bearer or to order, shall be wholly in writing; and that all notes, etc., under the aforesaid amount and payable as aforesaid which should be made or issued after the first day of April, then next, and which should bear the impression of types, plates, or printing, *should be utterly void*, and that no action should be thereon sustained in any court or law. \* \* \*

“However hard the operation of the statute may appear to be against persons, into whose possession such notes may have come *bona fide*, and for a valuable consideration, it is a hardship created by law for the public good, and the courts of law are prohibited from granting any relief against it.”

“There are but few cases in which a bill or note is void in the hands of an innocent indorsee for valuable consideration; such cases are, when the consideration in the instrument is money won at play, or it be given for a usurious debt. The English statutes against usury and gaming (and which have been adopted generally throughout the United States), are peremptory, and make the bill or note absolutely void. The same rule would *of course*, apply to every case in which the contract is by statute declared absolutely void.”

Kent's Commentaries, Vol. III., p. 80.

To the same effect are:

Bank vs. Alsop (Ia.), 19 N. W., 863.

Irwin vs. Marquet (Ind.), 59 N. E., 38.

Swinney vs. Edwards (Wyo.), 55 Pac., 306.

Emerson vs. Townsend (Md.), 20 Atl., 984.

Band vs. Portner (Ohio), 21 N. E., 634.

Voreis vs. Nussbaum, 16 L. R. A., 47, p. 47-48.

Wyatt vs. Wallace (Ark.), 55 S. W., 1105.

“This doctrine, as well as the one which protects the purchaser without notice, says Story, ‘Is indispensable to the security and circulation of negotiable instruments, and it is founded on the most comprehensive and liberal principles of public policy.’ Story, Prom. N., section 191. The only exceptions to this doctrine are those where the paper is *abso-*

*lutely void*, as when issued by parties having no authority to contract; or its circulation is forbidden by law from the illegality of its consideration, as when made upon a gambling or usurious transaction."

Cromwell vs. Sacramento County, 24 L. Ed. (U. S.), 687.

### **Where Lack of Power Exists the Plea of Estoppel Is Unavailing.**

If the only logical and inevitable conclusion—that these bonds were rendered void by *want of power* to issue them in violation of the Wright Act at the time they were issued and that thereafter, in accordance with that act, they *remained* void—is once admitted, it follows that the doctrine of estoppel, by conduct, ratification or recital, is inapplicable and cannot operate in this case.

In *Wichman vs. Placerville*, 147 Cal., 164, where municipal bonds were sued upon, the court said:

"The proposition that charters of municipal corporations are special grants of power from the sovereign authority and are *to be strictly construed*, and that whatever power is not given expressly, or as a necessary means to the execution of expressly given powers, is withheld, is a proposition too well settled to call for discussion. (*Douglas vs. Mayor of Placerville*, 18 Cal., 645.)

"Equally well settled is it that *want of power* is always a defense to a municipal corporation, and that *no estoppel, by conduct or by ratification*, to raise the question of *want of power*, can be urged



against such corporation. This last is a rule of necessity. If a corporation, by ratification, could validate an act, void as being *ultra vires*, no limit could be set to its powers. It could enter into any contract absolutely without authority at law, and by the simple process of recognition and ratification of the void contract give it validity. Such a rule could not, of course, be tolerated."

See also *Sutro vs. Pettit*, 74 Cal., 332.

When it is remembered that section 42 of the Wright Act expressly says that the officers of appellant "shall have *no power*" to issue bonds in the manner these bonds were issued, we submit it is idle to contend that the language contained in the last quotation is not in point here.

"Where there is *no power* or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel."

*Raisch vs. City, etc., of San Francisco*, 80 Cal., p. 6.

In *Atlantic Trust Co. vs. Town of Darlington*, 63 Fed. Rep., 76, the court said, page 81:

"The principle of estoppel or ratification cannot be applied to a municipal bond issued *ultra vires*. *Town of Ottawa vs. Perkins*, 94 U. S., 260; *Brenhem vs. Bank*, 114 U. S., 188."

These bonds were not merely issued *ultra vires*, but were issued in contravention of an *express mandate of the law* and in such a case the situation is beyond the reach of ratification, as was held in *Colby vs. Title Insurance and Trust Co.*, 160 Cal., 632, where the court said:

“That the doctrine of estoppel by conduct or by laches or even ratification has no application to a contract or instrument which is void because it violates *an express mandate of the law* or the dictates of public policy. Such a contract has no existence whatever. It has no legal entity for any purpose and neither action nor inaction of a party to it can validate it, and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity. The authorities are uniformly agreed on this principle, and the following cases, out of a number, are selected on this point, because they involve contracts which, like the instruments alleged by plaintiff to have been executed for an illegal consideration, were declared void as against public policy, and where it was held that the plea of estoppel as against such contracts could not be asserted:

Brown vs. First Nat. Bank, 137 Ind., 655, (37 N. E. 158, 24 L. R. A., 206.)

Langan vs. Sankey, 55 Iowa, 52; (7 N. W. 393.)

Wheeler vs. Wheeler, 5 Lans. (N. Y.,) 355.

Robinson vs. Patterson, 71 Mich., 141; (39 N. W., 21.)

Hardy vs. Smith, 136 Mass., 328.

Stanard vs. Sampson, 23 Okla., 13, (99 Pac., 796.)

McCormick Harvester Mfg. Co., vs. Miller, (Neb.) (74 N. W., 1061.)

Henry vs. State Bank of Laurens, etc., 131 Iowa, 97, (107 N. W., 1034.)

In Marsh vs. Fulton County, 19 L. Ed., (U. S.,) 1042, the U. S. Supreme Court said:

“It is also contended that if the bonds in suit were issued without authority their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the supervisors. But the answer to them all is that the power of ratification did not lie with the supervisors. A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying *possesses the power to perform the act ratified.*”

In *Fountain vs. City of Sacramento*, 1 Cal. App., 464, the court said:

“Instances are becoming too frequent where parties endeavor to fix illegal liabilities upon municipalities under the doctrine of equitable estoppel, thus seeking to avoid injurious consequences which they knowingly brought upon themselves.”

The clearness of the provisions of section 42 of the Wright Act brings the case at bar within the case of *Lukens vs. Nye*, 156 Cal., 498, where the court says:

“It is a principle in the English law, that an act of Parliament, delivered in *clear and intelligible* terms, cannot be questioned, or its authority controlled, in any court of justice. (1 Kent’s Commentaries, 447.) And in the United States, ‘if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws

flowing from the sovereign power in any other form of government. (1 Kent's Com., 448.) \* \* \*  
The agreement in question being wholly void, and also against public policy, *it cannot be the foundation for an estoppel.*"

**Recitals in Bonds are Unavailing Where There is Lack of Power to Issue Such Bonds.**

From the authorities we have already cited, we respectfully submit, it is apparent that no estoppel is operative in such a case as this, where the imperative mandate of the uncontrollable law has unalterably limited the powers of a public corporation, and where the same law has explicitly provided that bond issued in defiance of its express provisions "*shall be and remain absolutely void.*"

It must be conceded that recitals only operate by way of estoppel, and if estoppel cannot cure a void act, neither can a recital. It follows that a recital cannot be held to revive or validate anything done under an assumed, but non-existing power—when the law has not only stamped such thing "void," but also has said that it shall *remain* absolutely void—without striking down the principle, firmly imbedded in our jurisprudence, that any sort of estoppel is unavailing, when the subject at which the estoppel is aimed is a void act, and without striking down the principle, hoary with age, that the transcendent and uncontrollable sovereign power of the legislature cannot be modified, controlled or nullified by the courts.

"The power and jurisdiction of Parliament, says



Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws.”

1 Blackstone Com., 161.

It is elementary that, in the absence of constitutional objection, similar powers are vested in our legislature (Lukens vs. Nye, *supra*), and yet in effect it was urged in the case at bar, that when that legislature has spoken, its words can be ignored; that when it has lucidly said an irrigation district has *no power* to issue a bond in a certain way, and if so issued, such bond shall be and *remain absolutely void*, such edict goes for nothing, providing a certain recital appears in the bond. In fine, a thing made forever dead by the express words of the legislature can be recited into life again.

We submit, that no such startling theory can be upheld without! utterly subverting the thoroughly well settled doctrine, enunciated by very numerous cases to only a few of which we have referred, that estoppel goes for naught when it is either confronted by a “want of power” or by the express command of the legislature. In the case at bar the theory of estoppel is manifestly opposed by both of these obstacles.

Coffin vs. Board of Commissioners of Kearney County, 57 Fed. Rep., 137, was a case decided by the Circuit Court of Appeals of the Eighth Circuit. There the court said:

“No doctrine is better established than that a purchaser of municipal bonds is bound to ascertain if the municipality has authority to issue such securities, and that *no recital contained in a municipal bond can cure such a defect as an utter want of power* in the municipality to execute it. Dixon Co. vs. Field, 111 U. S., 83; Town of Coloma vs. Eaves, 92 U. S., 484, 490; Marsh vs. Fulton Co., 10 Wall., 676; Northern Bank of Toledo vs. Porter Township Trustees, 110 U. S., 608, 615; Anthony vs. Jasper Co., 101 U. S., 693, 697; McClure vs. Township of Oxford, 94 U. S., 429.”

The recital in these bonds in the case at bar is not a recital of facts, but purely *a conclusion of law*.

In Crow vs. Oxford Township, 30 L. Ed., (U. S.), 388, it is said:

“As against an objection that the bonds were issued in violation of a restriction in the constitution of the State as to the amount of bonds to be issued, it was held by this court, under a registration statute like that in the present case, that no conclusive effect was given by the statute to the registration or to the certificate; that the certificate was no more comprehensive or efficacious than the statement in the bond; that such statement did not extend to or cover *matters of law*; and that a ‘certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law.’ ”

See also Spitzer vs. Village of Blanchard, 82 Mich., 234.

Brenham vs. German American Bank, 30 30 L. Ed., (U. S.) 396.

Savings and Loan Ass'n vs. Topeka, 22 L. Ed., (U. S.) 461.

Aspinwall vs. Davies Co., 16 L. Ed., (U. S.) 296

South Ottawa vs. Perkins, 24 L. Ed., (U. S.) 154.

District Township of Doon vs. Cummins, 35 L. Ed., (U. S.) 1044.

These case of German Savings Bank vs. Franklin County, 32 L. Ed. (U. S.), 519, is as instructive case upon this subject. There, the bonds, contained recitals, which the plaintiff, who was a bona fide holder, claimed, precluded the county from showing the invalidity of the bonds. Notwithstanding the act under which the bonds were issued, did not declare that bonds not issued in conformity with the act should be void, yet as the contingency controlling the issue of the bonds had not occurred, the bonds were held void, and *a fortiori* the same result should follow in a case where—as in the case at bar—the statute expressly provides that bonds issued in defiance of the statute “*shall be and remain absolutely void.*”

We are not unmindful of the class of cases wherein it is held that recitals in municipal bonds estop the maker of such bonds from setting up a defense based upon “irregularities” *in the exercise of a granted power* and we are aware that some cases have gone so far as holding that irrigation district bonds are subject to the same rule, but we want a single case, in which recovery upon irrigation bonds has been permitted, when such

bonds were issued in the manner in which the bonds in the case at bar and in *Hughson vs. Crane* (115 Cal., 412), were issued, and *when the attention of the court was drawn to section 42 of the Wright Act.*

The case of *Baxter vs. Vineland Irrigation District*, 136 Cal., 185, was certainly not such a case. It is true the recitals there were the same as those in these bonds, but the defects there were confined to "irregularities in keeping the records, in conducting the elections, in failing to advertise bonds for sale and like matters." These omissions did not in themselves result in *incurring* any debt or liability by the *issuance* of bonds, within the meaning of the prohibitory language of section 42. The situation here is entirely different, because in this case, a liability was attempted to be incurred—contemporaneously with the issuing of these bonds by the invalid method of exchanging them for labor and commodities—"in excess of the express provisions of the act." (Sec. 42.) It therefore cannot be maintained that these bonds were not issued in the teeth of the statute or were not *ultra vires* and void. This is plainly not a case of "irregularity" in the exercise of a *granted* power, for we have seen that the act, instead of granting power to do what was attempted to be done here, definitely and distinctly says that the district *shall have no power* to do the very thing which was here attempted, and this court has repeatedly so held.

"The authority to dispose of bonds, being by express terms limited to two modes, *excludes all others* by plain implication. It cannot be reasonably said that the



power to exchange bonds for warrants issued for construction work is necessarily implied from the express power to exchange bonds in payment for property. And while it is true that the proceeds of bonds sold constitute the construction fund on which warrants for construction work may be drawn, still *there is no authority* for exchanging bonds for construction work, and there can be no implied authority to exchange bonds for warrants issued for such work.”

Leeman vs. Perris Irrigation Dist., 140 Cal., 543.

*The only mode* in which the board of directors of an irrigation district *can exercise their power* of disposing of the bonds of the district, under the provisions of the irrigation act, so they may become valid obligations against the district, is either to exchange them for property purchased for construction purposes, at their par value, under section 12 of the act, or to sell them for money in the open market, under the provisions of section 16 of the act, at not less than ninety per cent. of their face value; and *they have no power* or right to exchange the bonds for any other purpose, or to make payment with them at ninety per cent. of their face value, in discharge of any obligation of the district, or to dispose of the bonds, or of the moneys received from sales of the bonds, for any other object than to provide for the construction fund contemplated by the act.

Syllabus in Hughson et al., vs. John M. Crane,  
115 Cal., 404.

“The board of directors have power to acquire such water works in the manner aforesaid, and to issue the

bonds of the district in payment therefor, and that the board *has no other powers*, except those which are expressly given or are implied as necessary to carry out the main purpose of the act. And it is clear that where, as in the case at bar, a board has taken no steps whatever towards complying with the statute, by constructing or acquiring, or commencing or undertaking to construct or acquire, any system of canals or water works whatever, it has *no power* to give all the bonds of the district for a mere personal promise of another that he will in the future lease some water to the district at a stipulated rent. We agree with the conclusion of the learned judge of the court below, that the bonds to which the coupons sued on were attached *are void*.

Stimson vs. Allessandro Irr. Dist., 135 Cal., 393.

Upon the subject of "recitals," says the Wisconsin Supreme Court:

"To say that the supervisors had the power to bind the town because they recited that they had, is assuming the whole issue. It is reasoning in a circle. It is like the man pulling to overcome the law of gravitation. *It cannot be done.*"

Veeder vs. Town of Lima, 19 Wis., 298-317.

Here then, we have the important distinction, existing in the case at bar, that the bonds were palpably *ultra vires*. All that the Baxter case really holds is set forth in the following paragraph of the syllabus, viz.:

"Where it appears that the irrigation district was properly organized, *and that the bonds were within the authority of the board, and not ultra vires*, and the only questions raised related to al-

leged *irregularities* in the keeping of the records and in conducting the elections which authorized the issuance of the bonds, bona fide purchasers, without notice of such irregularities, who received bonds which were negotiable in form, and which recited a compliance with the law, are protected against any mere irregularities *in the exercise of the granted power.*,'

Baxter vs. Vineland Irrigation District, 136 Cal., 186. (Syllabus.)

Furthermore, in the Baxter case, the trial court found that the bonds "were legally issued and disposed of" (p. 187.)

Now in the Baxter case, the decision, as will be seen from the syllabus, proceeds upon the theory that there the bonds *were within the authority of the board* and not *ultra vires*. Evidently in that case—unlike this case—there was no illegal disposition of the bonds, as the trial court so found, and such defects mentioned in the district proceedings, as irregularities in keeping the records, bear no resemblance to the conditions in the case at bar, which conditions, under the decisions of this court, rendered these bonds void. Bearing in mind the different situation in the Baxter case, let us note further what was there said (although as we have remarked, part of the opinion is mere dicta), particularly a portion of the following extract from what purports to be (but really is not), the main opinion, to-wit:

"The objections to the proceedings relate to alleged *irregularities* in keeping the records, in conducting the elections, in failing to advertise the

bonds for sale, and like matters. It was held in Meyer vs. Brown, 65 Cal., 583, that the *power of a municipality to issue bonds being conceded*, no question of *irregularity*, or even of fraud, on the part of its agents could be considered where the bonds are in the hands of bona fide purchasers or holders for value without notice of the alleged irregularities. In Pompton vs. Cooper Union, 101 U. S., 196, cited in Meyer vs. Brown, it was said: "This court has uniformly held, when the question was presented, that where a corporation *has lawful power* to issue such securities, and does so, the bona fide holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face *recite the circumstances* which bring them within the power, the corporation is estopped to deny the truth of such recital.' "

Baxter vs. Vineland Irrigation District, 136 Cal., 190.

The quoted language clearly presupposes a case where the power of the corporation to issue bonds *is conceded* and where "irregularities" have occurred. Neither in Meyer vs. Brown nor in Pompton vs. Cooper Union, was there any statute involved, containing the drastic and far reaching provisions of section 42 of the Wright Act, which section, instead of conferring power, expressly withholds it and stamps all bonds issued in violation of the act void forever.

Besides, the bonds here do not recite the *circumstances* which bring them within the power of the district, but the recital is only a legal conclusion. How then can



the quotation be applicable here, when it refers to cases where the municipality was guilty of mere “irregularities” in the exercise of a *granted power* and we have seen there was absolutely *no granted power* to do what was attempted here?

As the decision of the Baxter case was a departmental decision (see 136 Cal., 185,) and as the concurring opinion was the joint opinion of Mr. Justice McFarland and Mr. Justice Temple, it appears that two out of the three departmental judges who participated in the decision, enunciated the doctrine contained in the concurring opinion and consequently, we respectfully submit, the concurring opinion is the ruling opinion of the decision and that what appears to be the main opinion contains only the individual views of the writer. (See *In re Coburn*, 165 Cal., 206, and opinion on rehearing *Del Mar Water Co. vs. Eshleman*, (167 Cal., 682). The concurring opinion is as follows:

“McFarland, J., concurring. ‘I concur in the judgment. I also concur in the foregoing opinion, unless paragraph 3 thereof can be construed as meaning that bonds of an irrigation district must always be held to be valid beyond question in the hands of a bona fide holder, if they are regular on their face and contain certain recitals. Such district has *only the powers which are given it by statute*; and if, in its name, bonds are issued which are *beyond its power* to issue,—*ultra vires*—they are of no more value than is a paper purporting on its face to be a negotiable promissory note of a maker who never signed it, nor authorized any one to sign

it for him. (See *Stimson vs. Alessandro Irr. Dist.*, 135 Cal., 389.) In the case at bar, however, only the *regularity* of the exercise by the trustees of a *granted* corporate power is involved.”

Temple, J., concurred.

An examination of that opinion unmistakably intimates what the opinion of the department was upon the subject, and shows convincingly the interpretation which must be placed upon the whole decision, and it clearly points out the vital distinction existing between an *ultra vires* transaction and irregularity in the exercise of a *granted* power. Furthermore, it places bonds issued in the method followed in the *Stimson* case—where the identical infirmity existed in the bonds as exists in these bonds—in the same category as a forged promissory note and obviously indicates that a recital will not validate such *ultra vires* paper.

Both opinions in the *Baxter* case are absolutely silent as to section 42 of the *Wright Act* and doubtless it was not drawn to the court’s attention, and we have yet to find a case where either in a State or federal court, it appears this section 42 has been mentioned, and at the same time void bonds held collectible. That section by its peculiar and stringent language is *sui generis* and other bond cases are therefore not parallel to the case at bar; when however, it is recalled that this *Wright Act* contemplated that bonds issued under it should “express on their face that they were issued *by authority of this act*,” (section 15, statutes 1887, p. 36), and that notwithstanding such recital it was also provided that,

if issued in contravention of the act, these self-same bonds should "be and *remain* absolutely void," it is very apparent that a recital was never intended by the legislature to make any difference whatever with respect to the invalidity of the bonds, because there is no exception or qualification appearing in the sweeping language of section 42 exempting bonds, containing any recitals, from the specific mandate of the legislature.

The Baxter case was cited in Leeman vs. Perris Irrigation District, 140 Cal., 544, but what was there said by Commissioner Chipman, with reference to the fact that the U. S. Supreme Court has held that a recital relieves a purchaser from looking further for evidence of compliance with the conditions annexed to the grant of power, is also *dictum* because that question was not before the court, and the plaintiff was not an innocent holder. Besides, this is not merely a case of recital operating as an estoppel to show a certain contingency or condition had not occurred or had not been complied with; on the contrary, section 42 cuts far deeper than that and plainly deprives the district *of the power* itself, without which power the bonds are as waste paper.

In the case last mentioned, again no mention in the opinion is made of section 42, and in neither that case nor in the Baxter case is the situation different from that in Mersfelder vs. Spring, 139 Cal., 595, where the court said:

"It is urged that in that decision no reference was made to the provisions of the code bearing on the subject, nor was their effect considered; and

hence, to use the language of the court in *Alferitz vs. Borgwardt*, 126 Cal., 207, that the decision 'was not a construction, but a *failure to note* the statute, and upon the authority of that case should be reversed.'

So we say here, the cases mentioned, containing the dicta to which we have referred, apparently "failed to note" section 42 and therefore were not a construction of the same. Such being the case, we submit those expressions furnish no real foundation for any decision embracing a question momentous to hundreds of ranchers and horticulturists in similar irrigation districts, from Fresno to San Diego; particularly when to hold that such recitals do work an estoppel inevitably involves overturning the doctrine—upheld in every jurisdiction where the common law is in force—that the solemnly and clearly expressed written will of the legislature contained in a constitutional act cannot be nulified by the decisions of the courts, because the legislative power—to use Blackstone's words—is "well nigh omnipotent."

Upon this subject, says Mr. Endlich:

"So long as a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage. The language of Mr. Justice Story, concerning constitutional construction, applies almost equally to that of statutes: "Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare *ita lex scripta est*, to follow and to obey."



(See also numerous cases cited in footnote to last quotation.) Endlich on Interpretation of Statues—pgs. 8-9.

So we reiterate, section 42 of this act, when it says such bonds as these are to “*remain absolutely void*,” lays down such an obviously plain and perspicuous injunction that it is beyond construction and must be enforced, regardless of consequences.

“It has, therefore, been distinctly stated, from early times down to the present day, that judges are not to mould the language of statutes in order to meet an alleged convenience or an alleged equity; are not to be influenced by any notions of hardship, or of what in their view is right and reasonable or is prejudicial to society; are not to alter clear words, though the legislature may not have contemplated the consequences of using them; are not to tamper with words for the purpose of giving them a construction which “is supposed to be more consonant with justice” than their ordinary meaning. Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd and mischievous. If the words go beyond what was probably the intention, effect must nevertheless be given to them. They cannot be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the intention conveyed may be, it must receive its full effect.”

Endlich on the Interpretation of Statutes, pages 7 and 8.

And in construing a statute, the question is not what the legislature meant, but *what its language means*.

“ ‘It may have been an oversight in the framers of the act,’ says Parke, B., on one case, ‘but we must construe it according to its plain and obvious meaning.’ Though the consequence should be to defeat the object of the act, a construction not supported by the language of it cannot be imposed by the court in order to effectuate what it may suppose to be the intention of the legislature. ‘Our decision,’ says Lord Tenterden, ‘may, in this particular case, operate to defeat the object of the act; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the legislature.’ *A fortiori*, where a statute in language clear, positive and direct and leading to no absurdity, gives a suitable remedy for an existing evil, though an inadequate one, a construction, which upon the ground of a supposed intention of the legislature to give a more effectual one, would undertake to enlarge the terms of the act, would be unwarranted; and especially in the case of penal statutes, a failure of justice resulting from grammatical and natural meaning of their terms cannot be obviated by a construction which would extend the language beyond such meaning. Again, ‘I cannot doubt,’ says Lord Campbell, ‘what the intention of the legislature was, but that intention has not been carried into effect by the language used \* \*

It is far better that we should abide by the words of a statute than seek to reform it according to the *supposed intention*.’ ‘The act, says Lord Abinger,

in another case, 'has practically had a very pernicious effect not at all contemplated; but we can not construe it according to that result.'

"In short, when the words admit of but one meaning, a court is not at liberty to speculate on the intention of the legislature, or to construe an act according to its own notions of what ought to have been enacted. Nothing could be more dangerous than to make such considerations the ground of construing an enactment that is quite complete and unambiguous in itself. 'The moment we depart from the plain words of the statute, according to their ordinary and grammatical meaning, in a hunt for some intention founded on the general policy of the law, we find ourselves involved in a 'sea of troubles.' Difficulties and contradictions meet us at every turn. Indeed, to depart from the meaning on account of such views, is, in truth, not to construe the act, but to alter it. But the business of the interpreter is not to improve the statute; it is to expound it. Whilst he is to seek for the intention of the legislature, that intention is not to be ascertained at the expense of the clear meaning of the words. The question for him is not what the legislature meant, but *what its language means*'"

Endlich on the Interpretation of Statutes, pp. 9, 10 and 11.

In the light of the foregoing authorities, when the act itself provides for a recital in these bonds, and also squarely says in unambiguous and plain language, without making any exceptions, that such bonds, notwithstanding the recitals, "shall be and *remain* abso-

lutely void," how can it be seriously contended that this language should be interpreted as if it contained a proviso, to the effect that the state of voidness shall not survive a recital or a transfer to an innocent purchaser, and that such purchaser shall acquire with the bond every right and incident belonging to a perfectly valid bond? Yet, we respectfully submit, such an unwarranted addition to the provisions of the act is indispensable to recovery by the respondent in this action, for there can be no state of *remaining* void if these bonds now possess the attributes of validity, and if such qualities can be ascribed to them or if the respondent can recover upon them, then the centuries old accepted theories of statutory construction, and the heretofore unchallenged doctrine, that no estoppel can be claimed with reference to an absolutely void transaction, like the pageant in the "Tempest," have "melted into air, into thin air."

Again, on this subject of recitals, it may be added that, although it has been held that such terms as "in pursuance of," "pursuant to" or "by authority of" import fulfillment of conditions precedent to the signing of the bond (28 Cyc., 1630), yet it would be absurd to say such recital can cover matters and events transpiring, or steps taken *after* the bond is signed and the recital thereby made. (See *Mercer vs. Prov. L. and T. Co.*, 72 Fed., pages 629, 636; *Parker vs. Smith*, 3 Ill. App., 356.)

It follows that, if the defendant in error is correct in his contention that the words "issue," or "issuing," as



used in the Wright Act, mean simply the authorization and preparation of the bonds *prior to their delivery*, any question respecting their invalidity arising from a subsequent disposition or delivery of the bonds cannot be embraced within the recital in these bonds, to the effect that they are *issued* after a full compliance with the Wright Act, hence, even if the defendant in error were considered an innocent purchaser of the bonds, it is obvious he could not avail himself of this recital to protect himself against any infirmity in the bonds arising from the bonds having been used and delivered, *after* such recital was made, in payment for materials, contrary to the express provisions of the Wright Act.

#### Point IV.

The court erred in rendering said judgment and findings for the reason that no judgment of the Superior Court, declared these bonds to be valid. (Subdivision (j) of Specification 9—Trans. p. 130).

Very little need be said upon this point. It is alleged in the amended complaint that on December 12, 1890, an action was brought to determine the validity of these bonds. (Tr. p. 25). As none of the bonds sued on were in existence then, it is apparent that the decree rendered in that action, could not validate steps, respecting these bonds, *taken after the action was brought*. Some of the contents of the judgment roll in that proceeding are set forth on pages 120 to 123 of the transcript. Apparently, action was attempted to be brought under authority of what is sometimes called the "Confirmatory Act," relating to Irrigation Districts. (Cal.

Statutes 1889, p. 212). The petition set forth that the board had ordered bonds to the amount of \$500,000 to issue, and had accepted a proposition from the Semi-Tropic Company for the *exchange* of all of said bonds at par for certain property. The decree also recites that an order for the *exchange* of these bonds at par, for water, etc., had been made, and the court undertakes to confirm and approve the transaction.

It will be seen this was attempting something which the court did not have jurisdiction to do and the petition on its face, in alleging this contemplated exchange, so shows. (Trans. 120-122).

In *Stimson vs. Aless. Irr. Disct.*, 135 Cal., 394, the Court, in referring to this Confirmation Act, said:

“The court had only such jurisdiction as was given it by the act. But that act contemplates a confirmatory judgment only in case of a “sale” of the bonds of the district. By section 1 it is provided that the board of directors may commence a “special proceeding” by which the proceedings of the board “providing for and authorizing the issue and sale of the bonds of said district” may be judicially examined and confirmed. By section 2 it is provided that the petition of the board shall set forth all proceedings had “for the issue and sale” of the bonds; and by section 5 it is provided that the court “shall have power and jurisdiction” to examine into and approve all proceedings for the organization of the district, and all proceedings which may affect the legality of the bonds, “and the order of sale, and the sale thereof.” It evidently refers to the provisions of the original act for the sale of

bonds, which are to be found in section 16 of that act. *It has no reference to the provisions of section 12, hereinbefore quoted, that in case of purchase of any property authorized to be purchased, bonds may be used at their par value in payment.* But in the case at bar the issuance and delivery of the bonds to the Bear Valley Irrigation Compaay are not within the provisions of either section 12 or section 16; and no jurisdiction to confirm those acts was given to the court by the statute invoked."

It is undeniable that none of the bonds sued upon here was ever *sold*. On the contrary, they were issued under an attempt to come within the provisions of section 12 of the Wright Act (Stowell vs. Rialto Irrigation District, 154 Cal. 221), and to that section, the Confirmation Act is inapplicable.

For stronger reasons, the last named act could not validate future invalid acts of the Irrigation District or its officers, and yet the defects in these bonds arose from antedating and illegal disposition of the bonds, all done and made after the commencement of the confirmatory proceeding. The effect of the proceeding, even when it comes to attempting to confirm a *sale* of such bonds, is also most questionable. (See Treges vs. Modesto Irr. Dist. 41 L. Ed., U. S., 395.) In the last mentioned case, Mr. Justice Brewer, in referring to this confirmatory act, says: "It may well be doubted whether the adjudication really binds anybody."

#### **Point V.**

The court erred in rendering said judgment and findings for the reason that the defendant in error did not

acquire or purchase any of said bonds or coupons without notice of their invalidity. (See Subdivision (1) of Specification 9, Tr., p. 130.)

We have seen that whether or no the defendant in error was an innocent purchaser for value, becomes immaterial, with reference to these bonds, as the effect of section 42 causes them to remain void into whosoever hands they come, if they were originally void, either from antedating or from being illegally delivered, but we deny that the defendant in error could have been an innocent purchaser. As we have seen, he knew that the bonds, delivered under the contract with the Semi-Tropic Company, were not even in existence or printed upon the date they bore (Trans., pp. 63, 64, 68, 69). And he also knew about the arrangement the district had with the Semi-Tropic Company. (Trans, p. 69.)

Furthermore, as to the bonds which he received from the district, under his contract of January 2d, 1895, he he knew also that those bonds were not correctly dated and he must be charged with knowledge of the law which rendered it impossible to validly issue and deliver such bonds in payment for property which was not contemporaneously received by the district.

See Tr., pp. 115, 57.

“Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.”

Section 19, Civil Code.



In McClure vs. Township of Oxford, 94 U. S., 432, a suit upon interest coupons, the court said:

“To be a bona fide holder, one must be himself a purchaser for value without notice; or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after *being put upon inquiry*, he might have ascertained by the exercise of reasonable diligence.”

In Lytle vs. Town of Lansing, 147 U. S., 59 a suit in which negotiable bonds “good on their face,” were held invalid as to the holder, because of certain suspicious circumstances, the court said:

“No rule of law protects a purchaser who wilfully closes his ears to information, or refuses to make inquiry when circumstances of grave suspicion imperatively demand it.”

It is respectfully submitted that the judgment should be reversed.

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Attorneys for Rialto Irrigation District.

No. 2491.

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United States  
Circuit Court of Appeals <sup>3</sup>

FOR THE NINTH CIRCUIT.

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Rialto Irrigation District, a corporation,

*Plaintiff in Error,*

*vs.*

N. W. Stowell,

*Defendant in Error.*

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BRIEF OF DEFENDANT IN ERROR.

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J. W. SWANWICK,

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Filed

SEP 24 1913



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## BRIEF OF DEFENDANT IN ERROR.

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### STATEMENT OF THE CASE.

In the statement of the case appearing in the brief of plaintiff in error attention is called to the fact that both parties to the action have sued out writs of error. The plaintiffs in the court below did sue out writs of error which are now pending in this court, but upon more mature consideration of the point involved on those writs, viz.: failure of the court to allow interest upon the overdue coupons, we have come to the conclusion that the lower court was correct in its ruling, and have decided to and do hereby waive our right to



a further prosecution of those writs of error. There remains, then, for consideration by this court, only the points involved in the writ of error prosecuted by the defendant below.

#### STATUTES OF LIMITATIONS.

Before discussing the authorities cited by plaintiff in error, we think it important to consider first the nature of the bonds in question; and second, the nature of the plea of the Statute of Limitations as applicable to the bonds in controversy.

The bonds here involved were issued under the provisions of the "Wright Act" (Statutes of California, 1887, page 29, *et seq.*). Our contention in the court below and our contention here is that these bonds are payable *ONLY* from a particular fund. Our contention in that behalf is based upon the fact that under the provisions of the act under which these bonds were issued, a certain fund is provided for which is applicable to their payment. And not only is there no other fund provided for from which they can be paid, but that there is no power vested in the irrigation district by virtue of which it can obtain funds for the payment of bonds except by the creation of what we term the "Particular Fund" out of which the bonds are to be paid.

An irrigation district formed under the provisions of the "Wright Act" is not a municipal corporation in the general sense in which the term is applied generally to municipalities exercising the ordinary func-

tions of government. The title of the original "Wright Act" is as follows:

"An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes."

Under the provisions of the "Wright Act" funds may be acquired by the district in the following manner:

FIRST: By the sale of the duly authorized bonds of the district (section 16, Act of 1887, Statutes 1887, page 36).

SECOND: By the levee of an assessment sufficient to raise interest and principal of outstanding bonds. (Section 22 *id.*)

THIRD: By tolls and charges from persons using the canal for irrigation and other purposes or by levy of assessment, or by both tolls and assessments. (Sections 37 *id.*)

The money so obtained can only be used for the following purposes:

FIRST: That obtained by the sale of bonds for the construction of canals, works, acquisition of property and rights, and otherwise to carry out the effects and purposes of the act. (Section 16, page 36.) Section 37, page 43, specifically provides that the costs and expenses of purchasing and acquiring property and constructing the works and improvements provided for, shall be wholly paid out of the construction fund.

SECOND: The money obtained from the assessment levied for the purpose of raising funds to pay the interest and principal of outstanding bonds shall be paid into the treasury and should constitute a special fund to be called the "Bond Fund." (Section 22, page 38.) This money shall be used in the payment of the interest and installment coupons of the bonds. (Section 34, pages 41 and 42.)

THIRD: The moneys received from the tolls and charges or the levy of an assessment provided for by section 37 of the act, are to be used in defraying the expenses of the organization of the district and the care, operation, management, repair and improvement of such portions of the canal and works as are completed and in use, including salaries of officers and employees.

While it is true, as contended by plaintiff in error, that the bonds in suit do not in terms provide that they shall only be paid from a fund which is provided for by the district for their payment, still when the limitations of the district are taken into consideration and the fact that there is no other fund from which they can be paid, the same result is obtained as though it had been provided in terms that the bonds in question should only be payable from the fund that is provided for and is specifically named the bond fund.

We do not think it will be contended that the directors of the district have any other or different powers than those specifically given by the act in question, therefore when they are given the power to raise funds in a certain manner and are given no other

power in that respect, we submit that there is no general power by virtue of which they can raise funds for the payment of the bonds in question.

Counsel for plaintiff in error calls attention upon page 52 of their brief to the fact that the Act of 1897 omits the provisions of the original "Wright Act" which refer to the raising of any special fund and the payment of bonds thereunder. The Act of 1897 contains the following provision:

"The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and in any year in which any bonds shall fall due must increase said assessment to an amount sufficient to raise a sum sufficient to pay the principal of the outstanding bonds as they mature. The secretary of the board must compute and enter in a separate column of the assessment book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated. When collected, the assessment shall be paid into the district treasury and be apportioned to the several proper funds."

The Act of 1897 also provides for the repeal of the original Act of 1887 and the acts amendatory thereto only so far as they may be inconsistent with its provisions. (Statutes 1897, page 287.)

The provision of the Act of 1897 providing for a levy of assessment, and that when collected it shall be apportioned to the several funds, has the effect of continuing the funds provided for by the original act. In other words, what can be termed several funds, used



in the Act of 1897, mean unless there are certain funds to which they can be paid.

Counsel devote a considerable portion of their brief to a discussion of section 312 of the Code of Civil Procedure of the state of California and seem to proceed upon the theory that there is no power in the court to maintain an action unless commenced within the periods prescribed in the title referred to in said section.

Section 312 is as follows:

“Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute.”

Notwithstanding the provision of the foregoing section to the effect that actions without exception can only be commenced within the periods prescribed, the Statute of Limitations has been uniformly construed by the court to be defensive matter. In other words, notwithstanding the provisions of the section quoted, actions can not only be commenced, but can be prosecuted to a successful conclusion unless the defendant by some affirmative act takes advantage of the Statute of Limitations. In short, the Statute of Limitations can always be waived by not pleading the same. Our contention in that behalf is this: that not only can the statute be waived by a failure upon the part of the defendant to take advantage of its provisions after the action has been commenced, but also can be sus-

pended by contract, either express or implied. It will be readily conceded that a defendant could in any case suspend the provisions of the Statute of Limitations by entering into an express contract for that purpose. If the defendant can expressly suspend the provisions of the Statute of Limitations, it necessarily follows that it can also suspend the same by such conduct or such a line of action which would amount in law to either an estoppel or an implied contract on its part.

The cases involving the particular fund doctrine hereinafter discussed are based upon the theory that the Statute of Limitations is suspended, does not run, and cannot be pleaded during the time that the debtor neglects to perform the special duty imposed upon it of providing the particular fund by taxation—to compel the performance of which duty would require the court to supervise the conduct of all persons charged with any official duty in respect to the levy, collection or disbursement of the taxes in question, until the bonds, principal and interest, were paid in full, which, as the court says in *Freehill v. Chamberlain*, would place it in the power of a municipality in many cases to avoid all payment of its debts, as by concert of action each officer might omit to perform his duty, and the time consumed in compelling each to perform might be made to consume all the period of the statute before the funds would reach the treasury.

The case at bar comes within the reason of the rule. The law has imposed upon the Rialto Irrigation District a certain duty; that is, the duty of providing a particular fund for the payment of all its bonds

which are properly issued and outstanding. Until it has performed this duty by providing the fund for such payment, it is not entitled to the benefits of the Statute of Limitations.

Lincoln County v. Luning, 133 U. S. 529, 33 L. Ed. 766.

The action was upon certain bonds and coupons issued under the Funding Act of Nevada of 1873 (Statutes of Nevada 1873, page 54; Compiled Laws of Nevada (addition of 1873), volume 2, page 518). In commenting upon this case, counsel for plaintiff in error say (page 79 of their brief):

“It will be seen that the Act of 1873, authorizing these bonds, provided for a *special tax* to be levied annually and placed in a fund to be used *only* for the payment of the interest. It is evident from the case, that if the Act of 1873 had been all that had been done relative to these bonds, the Statute of Limitations would have been applicable.”

We agree with the concluding statement in the above quotation, but not because the special fund provided for by the Act of 1873 was to be used *only* for the payment of the interest. Section 8 of the Act of 1873 does provide for the levy and collection of a special tax to be called the “Interest Tax,” of forty-five cents on each one hundred dollars of taxable property, etc., and the same section also contains a provision to the effect that the fund derived from this tax shall be applied only to the payment of the in-

terest of the bonds, but the Act of 1873 also contains the following provision:

“Section 9. It shall be the duty of the county treasurer of Lincoln county to make such arrangements for the payment of the interest of said bonds when the same falls due; at least thirty days before the time of payment; and in the event said interest fund is insufficient, the treasurer shall draw on the general fund of the county for such purpose; and in the event that said fund shall prove inadequate, the said treasurer is authorized and required to make such contracts and arrangements as may be necessary for the payment of said interest, and for the protection of the credit of the county of Lincoln.”

This statute contains what we consider a clear illustration of the difference between a general obligation of a public corporation and an obligation payable only out of a special fund created for the purpose of such payment. While it is true that under the provisions of the Nevada Statutes of 1873 a special fund was created which was to be used only in the payment of the interest upon the bonus in suit, it is also true that the same act contained appropriate provisions for the payment of these same obligations from general sources. In other words, the obligation assumed by the county upon the sale of the bond was that it would provide a special fund for the payment of the interest coupon by the levy of the special assessment provided for in the act, and that failing to do so, it would pay the same obligation out of its general funds. Thus was a clear case of an obligation to pay first out of



a special fund and second generally. By the Act of 1877 a different condition arose:

The Supreme Court, referring to that act, says:

“This act provided for the registration of the coupons and their payment in a particular order, was a new provision for the payment of these bonds, which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to pay such coupons as were registered, in the order of their registration, as fast as money came into the interest fund; and such promise was by the creditor accepted; and when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the Statute of Limitations until he shows that that fund has been provided.”

Where the Supreme Court says: “That it amounted to a promise on the part of the county to pay such coupons as were registered,” and such promise was by the “creditor accepted,” the court recognizes that a new contract had arisen between the county and the creditor by which the creditor could safely wait.

Applying the principles of the Luning case to the case at bar, we say: the contract between the bondholder and the county of Lincoln at the time of the original sale of the bonds was different from the contract between the district in this case in that in the

former the bondholder acquired a general obligation of the county and in the latter an obligation which could only be payable out of the special fund provided for in the only act whereby the district acquired the power to issue the bonds in suit. The provisions of the Wright Act became part of the contract between the bondholder and the district. (Cite authority.)

The bondholder must have known that the only way by which he could collect his bond was through the way provided for in the act, viz., by the bond fund, and the district, by taking his money, should, by all principles of common honesty and justice, be estopped from taking advantage of its own failure to comply with the terms of a contract entered into freely and for its own benefit. Again, by the Act of 1877 and the creditor's acceptance of the same by the registration of his bonds, the contract between the municipality and the creditor became one similar in all essential respects to the contract between the parties here.

The Supreme Court says in the Luning case (reference to the Act of 1877):

“As it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait.”

We have utterly failed to grasp the real significance of the Wright Act if it does not also provide a special trust fund for the payment of the obligations

authorized by its terms to which the bondholder might look and for which he might safely wait.

The case of *Shoenhoeft v. Kearny County*, 92 Pac. 1097, furnishes an excellent illustration of what we consider the difference between ordinary municipal bonds and obligations of a public corporation payable out of a special fund, our contention being that the bonds in suit belong to the latter class.

We invite the particular attention of the court to the quotation from *Shoenhoeft v. Kearny County*, *supra*, appearing on pages 84 to 89 of the brief of plaintiff in error. The court is there discussing the difference between bonds and warrants, and says:

“Although warrants may take the form of negotiable paper, and be made payable at a specific date, they are not negotiable in a commercial sense, belong in a class by themselves, and are fundamentally different from the ordinary municipal bonds and coupons representing installments of interest upon such bonds.”

The court there notes the fact that though the warrants which it is there considering are payable at a specific date, they are not negotiable in a commercial sense, and that they are fundamentally different from the ordinary municipal bonds, so we say in reference to the bonds here involved, though they are payable at a specific date, they are not negotiable in a commercial sense and they are different from the ordinary municipal bonds in the sense that they are not issued by an ordinary municipal corporation and are only

payable from the special fund provided by law for their payment.

Counsel refer to the fact that the Wright Act provides that the bonds issued in accordance with its provisions shall be negotiable in form. They therefore draw the conclusion that if the bonds in question are not negotiable, they are void under the provisions of the Wright Act. All that the Wright Act provides for in this behalf is that the bonds issued shall be negotiable *in form*. As to whether or not they are negotiable instruments as a matter of fact, is entirely a different question. The fact that the legislature in terms provided that the bonds shall be negotiable in form and did not provide that they should be negotiable instruments, clearly shows the distinction.

Continuing our comments on the quotation from the Schoenhoeft case, the court says: "All warrants must specify out of what fund they are payable." While there is nothing upon the face of the bonds in suit here indicating what fund they are payable from, the provisions of the act under which they were issued provide the fund from which they are payable, and, as that act becomes part of the contract between the bondholder and the district, they do thus provide or specify the fund from which they are payable. The court further says:

"Under this statute, warrants are simply drafts on anticipated revenue (citing cases), which, whatever the form or expressed date of maturity, are not, in law or in fact, payable except as from



time to time money to meet them is received into the specific fund of the treasury upon which they are drawn.”

So, in the case at bar, these bonds are merely drafts on anticipated revenue, and are not, in law or fact, payable except as money is received into this specific fund of the treasury upon which they are drawn, viz.: they are not payable in the sense that there is anything from which they can be paid. It is true that like warrants they are payable at specific dates; they are payable in terms upon a certain date, but when we consider the real contract, which contract is evidenced not only by the bonds in suit but also by the statute under which they were issued, then the fact that they are not payable, in law or in fact, upon the date indicated upon their face, except or provided that there is money in the specific fund, becomes apparent.

The court in the case under consideration goes on to say:

“A judgment upon a warrant merely establishes the claim against the municipality, and it is still payable only in the order of its registration from the fund designated for the purpose.”

We wish to call particular attention to this language. The only judgment which we can obtain in this action is a judgment establishing the validity and amount of the indebtedness represented by the bonds in suit. It is not a judgment upon which an execution will lie in any general sense, but only a judgment which may be the basis of another proceeding for the

purpose of obtaining the money for its satisfaction. The analogy between the kind of judgment which may be obtained upon the warrant which the court is discussing in the case under consideration and the judgment which may be obtained in the case at bar is perfect.

In the case under consideration the court in discussing the bonds there in suit, which were held to be general obligations of the municipality, goes on to say:

“True, a fund must be created by taxation to meet coupons representing the interest upon bonded indebtedness, but no particular fund is, at the time of their issue, expressly pledged in advance to their payment, and, *whether or not money has been raised to meet them, they are due and payable absolutely* upon the stated days of their maturity.”

Perhaps the above quotation furnishes as apt an illustration of the point we are making as it would be possible to find. If our contention be correct that a particular fund was provided for by the terms of the contract under which these bonds were issued (which contract includes not only the bonds themselves but the statute under which they were issued), a particular fund which was at the time of their issue expressly pledged in advance to their payment, then the difference between a general municipal obligation payable out of the general fund of the municipality and the obligation evidenced by the bonds in suit is complete.

Again the court says: “Unless the circumstances be decidedly exceptional, bonds and their attended

coupons mature according to contract.” Again our point is made clear. What is the contract under which these bonds were issued? Is it merely the contract expressed upon the face of the bonds or does the statute under which the bonds were issued enter into and form a part of that contract?

We have extended our discussion of the Shoenhoeft case for the purpose of emphasizing our position. It is not necessary to take up the time of the court with the further discussion of this point. Many cases are cited in the brief of plaintiff in error based upon the same theory which is elaborated in this Shoenhoeft case. We have selected this case for particular discussion on account of the prominence to which it is given in the brief of counsel and also because the quotation from the case contained in that brief furnishes so clearly an illustration of the difference between the general municipal security or the municipal security payable out of the general fund of the municipality and the specific obligation of a public corporation fund *to be* created for the purpose of meeting this obligation.

The bonds of irrigation districts are similar to improvement bonds payable from assessment only. In speaking of this class of bonds in Dillon on Municipal Corporations (vol. 11, sec. 893, p. 1390, 5th Ed.) the author says:

“But if the enabling act does not in express terms limit the power of the municipality to an issue of bonds which are payable only from the special assessment or other designated fund, or

if the municipality, besides having power to issue bonds under a statute so limiting its liability, has also power to issue its general obligations, a bond which by its terms is the direct and absolute promise of the municipality to pay a definite sum of money with interest and is not declared to be payable only from the fund, is the general obligation of the city, payable from its general funds or general power of taxation."

If the converse of this proposition be true, then if the municipality has no power to issue its general obligations, the bonds in question cannot be general obligations of the district and cannot be payable out of a general fund which has no existence.

In an attempt to distinguish the case at bar from other particular fund cases, plaintiff in error calls attention to the fact that the present action is one to recover a money judgment, whereas, they say, in the particular fund cases no money judgment could be recovered because the debtor could not be sued and, therefore, this cannot be a particular fund case—that the particular fund doctrine has been applied only to cases where the debtor could not be sued and where the writ of mandate to compel payment by the treasurer was the only remedy.

Does the right to sue the Rialto Irrigation District and obtain a judgment on these bonds afford a remedy which brings the holders of the bonds any nearer to the recovery of their money than were the holders of the bonds in any other particular fund cases who, counsel say, did not have such right to sue? It clearly



does not. No personal judgment can be recovered against the plaintiff in error on these bonds. The judgment in this action amounts to nothing more than did the legislative actions which determined the validity and amount of the bonds in other particular fund cases, such as Freehill v. Chamberlain, *supra*, where the court says:

“It was not necessary that these coupons should have been presented to or allowed by the auditor and board of trustees; they did not constitute demands within the meaning of sections 9 and 10 of the Act of April 25, 1863; neither the auditor nor the board of trustees had any discretion or authority to reject them or prevent their payment; *the statute under which they were issued established them as debts to be paid.*”

Counsel here recognize the fact that no general judgment can be recovered here. We quote from their brief in the court below:

“An irrigation district does not own property which is subject to execution. It holds such property in trust for the inhabitants of the district and it cannot, therefore, be taken under execution issued upon a judgment. The mere fact, therefore, of getting a judgment upon bonds against the district does not place the owner of such judgment in a position which would be equivalent to the ability to recover his money. If there is no money in the treasury, the judgment cannot be enforced except by resort to mandamus to compel the levy of taxes sufficient to raise the amount of his judgment. \* \* \*” (Page 44.)

The nature of the judgment to be recovered in this action has been recognized by the federal courts so often that a brief reference to the authorities upon that question is all that can be necessary.

In the case of *Waite v. City of Santa Cruz*, 89 Fed. 619, Justice De Haven, in speaking of the nature of an action in some respects similar to this, uses the following language, which we quote for the purpose of showing the nature and effect of the judgment to be here recovered:

“In *Heine v. Commissioners*, 19 Wall. 655, the Supreme Court, speaking by Mr. Justice Mille, point out that upon the refusal of a municipal corporation to pay its bonds the appropriate way to proceed in the federal courts is to first sue at law, and obtain a judgment establishing the validity of the bonds, and then, if necessary, obtain a mandamus to enforce the judgment. This course was followed and upheld in the following, among many other cases which could be cited: *Commissioners v. Aspinwall*, 24 How. 375; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Riggs v. Johnson Co.*, 6 Wall. 166; *Walkley v. City of Muscatine*, *Id.* 481. A consideration of these cases, as well as section 629, Rev. St. U. S., above cited, leads to the conclusion that the present action is clearly within the jurisdiction of the court.”

Plaintiff in error cites the case of *Barnes v. Glide*, 117 Cal. 1, as authority for the proposition that the statute of limitation runs against the right of a writ of mandate to compel a levy of taxes to provide funds

for the payment of obligations payable from a particular fund. All that the court decided in that regard was that the statute ran against the right to a mandate under the facts as they existed in that particular case, as the defendants there came within the general rule that a municipal corporation has the right to avail itself of the defense of the statute of limitation as fully as any other debtor. There were no facts in that case bringing it within the "particular fund" doctrine, and the court so distinguishes it from the case of *Freehill v. Chamberlain*, *supra*, in which, as the court says, the bondholders were to rely exclusively upon a certain special fund distinct from the general fund, and from all other funds of the city. The swamp land district involved in *Barnes v. Glide*, according to the facts stated in the briefs in that case, was organized on the 18th day of September, 1877, under part 3, title VIII, chap. art. II, Political Code, particularly under sections 3446, 3447, 3449, 3450, 3451, 3452, 3453 and 3483. The court held with respondents, whose contentions that no particular fund existed was stated in their brief as follows (page 14):

"Are the funds of a reclamation district, in the custody of the county treasurer, special in the same sense that no action against such district to recover on a warrant drawn on its treasury can be had until there is money in such fund to pay such warrant?

"A reclamation district is a single entity in that respect like a city, county or state.

"There is no provision in the charter of such dis-

tricts (Pol. Code) authorizing it to raise funds for any special purpose.

“All assessments on the lands of a district are levied in a certain way, and they go into the county treasury and constitute a single fund against which all its warrants are drawn.

“In one sense all funds of any municipal corporation are special, *i. e.*, specially devoted to the payment of warrants drawn on its treasury, and to this the funds of a reclamation district constitute no exception.

“But the special fund for the payment of a debt which will suspend the running of the statute of limitations must be created by, or in the interest of, the creditor for the payment of the particular debt.”

1 Wood on Lim., Sec. 127.

(Page 24):

“Much stress is placed by counsel (p. 55) on the words in the several warrants described in the complaint, ‘from the swamp land fund in the treasury of said county to the credit of said district No. 307.’

“That fund constitutes all the moneys in the county treasury belonging to that district, and the order drawn on the treasury is in legal effect a general order on the treasury, to be paid out of the funds standing to the credit of the district. Those words do not make a special fund out of what is necessarily the only fund possible under the statute. To constitute a fund special within the meaning which will prevent the operation of the statute of limitation, it must be set apart from the other funds of the municipality and must be held



by it in trust specially for the particular warrants drawn on that particular fund.” (Citing *Lincoln Co. v. Lunning*, *Underhill v. Sonora*, and *Freehill v. Chamberlain*.)

The contention is made here that if the creditor can compel the creation of the fund by mandamus to the proper officers to levy the necessary tax, then the particular fund rule does not apply, and counsel would have us believe that in the case of *Freehill v. Chamberlain*, *supra*, in which the particular fund rule was applied, the bondholders could not have compelled the levy of the tax, but had only the remedy of mandamus against the treasurer when moneys were in the fund. They quote in support of their contention the language of the Supreme Court in *Barnes v. Glide*, as follows:

“Appellant relies greatly on *Freehill v. Chamberlain*, 65 Cal. 603; but that case is not pertinent to the case at bar. That case was simply mandamus to the treasurer of the city of Sacramento to compel him to pay the interest on certain bonds. Those bonds had been issued by the city under the Act of April 24, 1858 (Statutes of 1858, p. 280), which has frequently been held by this court to constitute an express contract between the city and the bondholders, by which the latter were prohibited from suing the city, and were to rely exclusively upon a certain special fund distinct from the general fund and from all other funds of said city. The only remedy which the bondholders had was mandamus against the city treasurer to compel him to pay the interest on the bonds when there was money in the fund to which

they could alone look under their special contract; and all that the court decided in *Freehill v. Chamberlain* was that no cause of action in mandamus against said treasurer had accrued until there was money in said fund, and that consequently the statute of limitations did not commence to run while there was no money in said fund with which the treasurer could pay said interest. It was not a proceeding which might have been commenced fifteen years before it was instituted."

By this language the Supreme Court was distinguishing the case of *Freehill v. Chamberlain*. Without saying in so many words that the case it was then deciding did not involve a particular fund (as we have shown that it did not), the court distinguished the two cases by pointing out that *Freehill v. Chamberlain* was a particular fund case. Counsel lay great stress upon the one sentence, "The only remedy which the bondholders had was mandamus against the treasurer, etc." Upon this last comment of the Supreme Court, which is mere dicta, counsel rely for the true meaning of the decision in *Freehill v. Chamberlain*. A study of *Freehill v. Chamberlain* will show that this sentence is erroneous when taken alone, and can only mean, when read with the entire paragraph of which it forms part, that the statute of limitations would only run against the right to mandamus the city treasurer to pay when there was money in the fund, as that was the only remedy by which the fund, when provided, could be directly appropriated by the bondholders to the payment of their claims. But that was by no means the

only remedy which the bondholders had. They could have compelled the levy of a tax to replenish the fund. The statute under which the bonds and coupons involved in *Freehill v. Chamberlain* were issued established them as debts to be paid, and no general judgment could be recovered against the city upon them. But it was made the duty of the supervisors under section 34 of the act authorizing the issuance of those bonds (Stats. 1858, p. 280) to

“levy, for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, a tax of one hundred cents on the one hundred dollars. \* \* \*.”

This being a duty enjoined by law, mandamus would lie to enforce its performance. The mere fact that the city could not be sued and a general judgment obtained against it would not prevent a proceeding in mandamus *against its officers* to compel the levy of the tax. Such a similar contention was made in the case of *McCauley v. Brooks*, 16 Cal. 11, where Chief Justice Field in passing upon the contention that mandamus would not lie to compel the state controller to issue a warrant because the state itself could not be sued upon its debt, said:

“The truth is, no officer, however high, is above the law, and when duties are imposed upon him in regard to which he has no discretion, and in the execution of which individuals have a direct pecuniary interest, and there is no other plain, speedy and adequate remedy, he can be required to perform those duties by the compulsory process

of mandamus. This is the settled doctrine not only of the federal courts, but of the highest tribunal of nearly every state in the union where the question has been raised." (Page 41.)

How, we ask, does it happen that mandamus would lie to compel the treasurer in *Freehill v. Chamberlain* to pay from the moneys in the fund, and yet (according to counsel's view) would not lie to compel the supervisors to levy the tax to provide that fund? Without seeking further for the merits of the point—it has none—it suffices to call the court's attention to the fact that the Supreme Court of California held directly in a case decided a few days before the decision in *Freehill v. Chamberlain* that mandamus did lie to compel the supervisors to levy the tax and provide the funds for the payment of bonds and coupons of the very issue involved in *Freehill v. Chamberlain*. The case is entitled *Meyer v. Brown*, and is reported in 65 Cal. 583. In that case the court, speaking through Mr. Justice Ross, say:

"The bonds carried with them the pledge of an annual tax for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, of one hundred cents on the one hundred dollars, fifty-five per cent of which to be set apart and appropriated to an interest and sinking fund, to be applied to the payment of the annual interest upon the bonds, and to their final redemption. The tax was the chief security offered the creditors as an inducement to accept the bonds in payment of their claims. When the bonds for whose payment, with



interest, provision was thus made, were issued and accepted by the creditors of the old city government, a contract was made as solemn and binding and as much beyond subsequent legislation as it would have been if made between private persons. These views will be found sustained and amplified in an able opinion recently rendered by the Supreme Court of the United States, in a case entitled *Louisiana v. Pillsbury*, reported in 105 U. S., p. 278. It is well occasionally to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations entered into for value, than there is to permit an individual to do so. Good faith, and fair dealing should be exacted of the one equally with the other. \* \* \* *It is therefore ordered that a writ of mandate issue to the municipality, and its authorities annually to levy and collect for municipal purposes on all real and personal property, etc."*

The very contentions made here by plaintiff in error were made by respondent and passed upon by the Supreme Court in the case of *Freehill v. Chamberlain*. We quote from the brief of respondents in that case (page 10):

"If the petitioner was not permitted to sue the city for the purpose of obtaining a money judgment, we apprehend that there were at all times other remedies to which he could resort, and that the failing to resort to them within four years from the time he became entitled to them, he is barred by the provisions both of section 337 and of section 343 of the Code of Civil Procedure. At any time after 1872 the remedy by

mandate against the treasurer was as speedy and adequate as it is now. If taxes were not levied he had his remedy by mandate to compel their levy. If levied and not paid into the proper funds, he had the same power to compel their proper appropriation. By section 35 of Statutes 1858, page 279, and section 26, Statutes 1863, page 426, 55 per cent of all revenues derived from and within the city limits for municipal purposes were required to be set apart for the payment of petitioner's debt, and he had a remedy to have it so set apart. This was clear from the words of the statute, and has recently been so decided by this court in *Meyer v. Brown*, No. 8896, filed September 28th, 1883."

And again, on page 9, after contending that since the city could not be sued, it could not be reached indirectly by proceedings against its officers, the respondents in that case said:

"But if we are mistaken in the foregoing views, and the petitioner is entitled to bring his action, or to proceed by way of writ of mandate, then he has been thus entitled for ten years or more before filing his petition herein. This is an action on a written contract and is barred by section 337 Code of Civil Procedure.

"If not barred by section 337, the petitioner is barred by section 343 Code of Civil Procedure, which declares that

'an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.'

The word 'action' as here used includes special proceedings. Code of Civil Procedure 363."

Counsel also lays great stress upon the fact that in the case of Barnes v. Glide, in referring to and distinguishing the case of Freehill v. Chamberlain, *supra*, the court says:

"It was not a proceeding which might have been commenced fifteen years before it was instituted."

The court here refers to the mandamus proceeding against the treasurer in Freehill v. Chamberlain, which it had decided would outlaw four years after the fund had been provided. The court was not referring to the remedy of the petitioner in Freehill v. Chamberlain to a mandate to compel the levy of the tax, because the court in the latter case held that the statute would not run against that remedy. The undisputed facts as set out in the briefs on file in Freehill v. Chamberlain show that for ten years the levy had not been made as the act provided, during all of which time the statute was suspended. It would necessarily follow that if the statute of limitation had been running against petitioner's remedy in Freehill v. Chamberlain to compel the levy of the tax, then his bonds would have been outlawed—which was not the ruling of the court.

Barnes v. Glide was not a particular fund case, as we have already pointed out, and therefore the statute was not suspended as in Freehill v. Chamberlain against the remedy to compel the levy. No particular fund had been pledged to the exclusive payment of the

warrants in *Barnes v. Glide*, and the petitioner there had no right to wait fifteen years before instituting his proceeding.

It is clear to be seen that the entire proposition now contended for by counsel was before the court in the case of *Freehill v. Chamberlain*, and the court there held that the statute would not commence to run until the city had performed its duty and placed the funds in the treasury, and says:

“The contrary view would place it in the power of a municipality in many cases to avoid all payment of its debts, because, if by concert of action each officer should omit to perform its duty, the time consumed in compelling each to perform such duty might be made to consume all the period of the statute before the funds would reach the treasury. We do not think the legislature intended such result.”

Counsel say that all that the Supreme Court decided in *Freehill v. Chamberlain* was that the right to mandamus the treasurer to pay out the moneys in his hands was not barred. Do counsel mean to infer that the remedy, which we have heretofore shown the bondholders there had, of compelling the levy of a tax by mandamus was or might have been barred? If such be their meaning, the result as applied to the bonds in the case at bar would be that the district might prevail here today, but, if funds came into the hands of the treasurer of the district tomorrow, our right to mandamus him to pay these very bonds would not be barred by the statute. The mere statement of



the proposition demonstrates its absurdity. If the bonds involved in *Freehill v. Chamberlain* had been outlawed because of the failure of the petitioner there to follow any one remedy, no other remedy would have been available as against the plea of such bar. But the court specifically held that the statute did not run against the right to levy the tax by mandamus and did run only against the right to mandamus the treasurer when he had moneys in the fund to which the petitioner might look for payment.

San Francisco Savings Union v. Reclamation District, 144 Cal. 649.

Counsel say that the decision in *Barnes v. Glide* has become a rule of property, and he quotes at some length from the case of *San Francisco Savings Union v. Reclamation District*, 144 Cal. 649, a case which followed and was based upon *Barnes v. Glide*. The case was brought upon warrants identical with those in *Barnes v. Glide*. No particular fund had ever been pledged to their payment. The Supreme Court affirmed the decision that the warrants were outlawed. We quote from respondent's brief in that case (pages 56-57):

"Counsel's contention that the warrants in the case at bar are payable out of a special fund is an assumption not warranted by the facts. The district has but one fund. All moneys of the district collected, for whatever purpose, must be paid into this, the general and only fund.

Pol. Code 3454-5-6.

“This fund may be said to be special as to the county, but not as to the district. It is only put into the county treasury for convenience’s sake and to save expense; but it is the only fund of the district. It could not possibly be more general.”

In commenting upon the position of the plaintiff in the lower court, counsel for plaintiff in error here make the following statement on page 119 of his brief:

“Unlike the cases of *Sawyer v. Colgan* and *Freehill v. Chamberlain*, where the plaintiffs had no “remedy” whatever, here in the case at bar a number of courses have been open to the defendant in error ever since the maturity of these coupons, to-wit.”

Counsel thereupon indicate that we might have sued upon the coupons in the federal court upon their maturity, or might have done the same thing in the state court, and if no funds were available, we could have obtained a writ of mandate to compel a levy of sufficient taxes to yield such funds. The plaintiff in *Freehill v. Chamberlain* could have instituted his mandamus proceeding, the same as in *Meyer v. Brown*, against the proper officers to compel the levy and collection of the tax which would have resulted in the payment of the necessary fund into the treasury. We submit, therefore, that instead of being *unlike* the case of *Freehill v. Chamberlain*, we are here in exactly the same position that *Freehill v. Chamberlain* was in and that a like ruling should follow here on the question of the statute of limitations.

*Sawyer v. Colgan*, 102 Cal. 283, held directly that

it is a general rule that when payment is provided for out of a particular fund or in a particular way, the debtor cannot plead the statute of limitations without showing that the particular fund has been provided or the method pursued. While it does not appear from the facts set forth in that case that any right existed on the part of the plaintiff to enforce the payment of his claim by a mandate to compel the levy of taxes therefor, at the same time the court clearly recognizes the rule for which we are contending and cites *County of Lincoln v. Lunning*, 133 U. S. 529, and *Freehill v. Chamberlain*, 65 Cal. 603, in support of the same.

The leading authority on the point that the Statute of Limitations does not commence to run until the particular fund has been provided is *Lincoln v. Lunning*, 133 U. S. 529, 10 Sup. Ct. 363, where the Supreme Court said:

“The remaining question arises on the Statute of Limitations. By the general limitation law of the state, some of the coupons were barred; but there has been this special legislation in reference to these coupons. The bonds were issued under the Funding Act of 1873. In 1877 the county was delinquent in its interest, and the legislature passed an act amendatory to the Act of 1873. This amendatory act provided for the registering of overdue coupons, and imposed upon the treasurer the duty of thereafter paying the coupons as money came into his possession applicable thereto, in the order of their registration. *St. Nev.* 1877, p. 46. The coupons, which by general limitation law would have been barred, were presented, as

they fell due, to the treasurer for payment, and payment demanded and refused, because the interest fund was exhausted. Thereupon the treasurer registered them as presented, in accordance with the Act of 1877; and, from the time of their registration to the commencement of this suit, there was no money in the treasury applicable to their payment. This act provided for registration and for payment in a particular order was a new provision for the payment of these bonds, which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to pay such coupons as were registered, in the order of their registration, as fast as money came into the interest fund; and such promise was by the creditor accepted; and, when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the Statute of Limitations until he shows that that fund has been provided."

The Supreme Court of California passed directly upon this point in the case of *Freehill v. Chamberlain*, 65 Cal. 603. In that case it was contended that as the coupons in question matured on their face at a date prior to the commencement of the action, the Statute of Limitations barred any proceeding to enforce their payment; and that if the proper amount of taxes were not levied in any one year, such levy should have been



compelled by mandamus. The court in reply to this contention said:

“We do not understand this to be the law as applicable to this case. According to the Act of April 25, 1863 \* \* \* no action could be maintained against the city on these bonds or coupons. By law, it was the duty of the city to make provision for the payment of the bonds and coupons according to the statute under which they were issued; and, by omitting to perform such duty, the city could not create the defense of the Statute of Limitations. Not until the funds were in the treasury, properly applicable, would the statute begin to run. Not until that period would the petitioner have any right of action or proceeding against the treasurer. The contrary view would place it in the power of a municipality in many cases to avoid all payment of its debts, because, if by concert of action, each officer should omit to perform his duty, the time consumed in compelling each to perform such duty might be made to consume all the period of the statute before the funds would reach the treasury. We do not think the legislature intended such result.”

“It is a general rule that where payment is provided for out of a particular fund or in a particular way, the debtor cannot plead the Statute of Limitations without showing that the particular fund has been provided or the method pursued.”

25 Cyc. 1068.

“Where it is provided by law that state or county bonds or the interest coupons thereon, or other municipal obligations shall be payable out

of a particular fund or in a particular manner, the Statute of Limitations does not begin to run unless it appears that the particular fund has been provided or the method pursued."

25 Cyc. 1103.

"When payment is provided for out of a particular fund to be created by the debtor, he cannot plead the Statute of Limitations until he shows that fund has been provided."

Wood on Limitations (third edition 1901), section 127.

The Circuit Court of Appeals of the Ninth Circuit in the case of Robertson v. Blaine County, 90 Fed. 63, in passing upon this point in a similar case, said:

"But there is another principle which we also believe to be applicable to this case which leads to the same result. The bonds and coupons herein sued upon were, by the statute authorizing their issuance, payable out of a particular fund, which was never provided for by Alturas county. The provisions of this statute imposed a continuing duty (citing authority) and became a part of the contract between Alturas county and its bondholders (citing authorities). The facts alleged in the complaint bring this case within the general rule that, when payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the Statute of Limitations without first showing that the particular fund has been provided, or that the particular method has been complied with."

In Berkey v. Board of Commissioners, 48 Colo. 104, 110 Pac. 197, the court says:

“Besides, on principle and authority, where payment is provided for in a special way, and out of a particular fund, with the affirmative duty upon the defendant to provide that fund, and make application of it as required by law, he may not set up and rely upon the Statute of Limitations until he first shows that he has complied with the terms of the statute, and is himself within the law. This principle is recognized in all of the cases, and upon it the decisions are in harmony.”

“Neither at the time of the maturity of the bonds nor at any subsequent date, has there been in the county treasury, or any other place of payment named in the bonds, sufficient money to pay those held by the plaintiff. There is no claim to this effect, hence the defendant is not in position to rely upon and apply the limitation statute.”

Each of the bonds sued on herein contains a recital to the effect that it is one of a series issued by authority of and pursuant to the requirements of the Wright Act (title of the Wright Act being quoted in full in the bond), and each bond contains a further recital, as follows:

“All the said bonds and interest thereon are to be paid by revenue derived from an annual tax upon the real property of the district, which tax is and the said bonds are by said act of the legislature made a lien upon all of said real property.”

This recital is of particular consequence upon the question of the payment out of a particular fund. The law under which the bonds were issued provides for the levy of an assessment to pay the same, and the bond

itself contains a recital to the effect that it is payable out of the fund which is to be provided in a particular way for that purpose. It amounts in effect, if not in terms, to a promise on the part of the district to pay the principal and interest of the bond at the dates therein mentioned, provided the fund out of which the payment is to be made shall have been collected.

The foundation upon which the particular fund doctrine rests seems to us to be this: The contract made or the obligation incurred by the irrigation district is not only the contract to pay a specific sum upon a specific date, but the provision of the act under which the sole authority and power to make that promise are contained, enters into and becomes a part of the promise made by the district as fully as though the entire act was itself incorporated in the bond.

The district, by the due execution of its bond, has expressly agreed to make certain payments at certain dates. It has also impliedly agreed that it will do the things required by law to be done in order to make its express promise of any value.

In the case of *Hewel v. Hogin*, 3 Cal. App. 248, which was an application for a writ of mandate to the treasurer of an irrigation district to pay the interest on certain bonds of the district, the court say:

“For many years able lawyers in this state and elsewhere contended that a municipal corporation held its funds as a trustee for those having demands, for the payment of which the money was provided, and that it could not plead the Statute of Limitations against a person having a claim



which was payable out of such funds. It was argued that a municipal corporation, like a bank, was simply the custodian of special funds, holding the same for the benefit of those who were or might be entitled thereto.

“It is apparent at a glance that this contention was diametrically opposed to the contention here. The courts, however, declined to adopt that extreme, though reasonable, view, and we understand the rule to be that the defense of the Statute of Limitations is a privilege personal to the debtor, and that a municipal corporation, in common with other debtors, may waive or avail itself of such defense in any legal proceeding. (Code Civ. Proc., Secs. 1089, 1091; *Bates v. Gregory*, 89 Cal. 398 [26 Pac. 891]; *Underhill v. Trustees*, 17 Cal. 178; *Barnes v. Glide*, 117 Cal. 8.) But while this is the general rule, it has been pointedly held, in a case very similar to the case at bar, that ‘when payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the Statute of Limitations without showing that the particular fund has been provided or the method pursued.’ (*Sawyer v. Colgan*, 102 Cal. 292.) Instead of making any such showing in the proposed amendment, or elsewhere in his pleadings, appellant affirmatively alleged that no fund was at any time provided for the payment of the interest coupons in question.”

And the court in that case also cites *Freehill v. Chamberlain*, *supra*.

The case of *Barnes v. Turner*, 14 Okla. 284, 78 Pac. 108, was a proceeding in mandamus brought by the

defendants in error against the mayor and councilmen of the city of Guthrie, to compel them to levy a tax upon the property of persons residing in the territory covered by the various old provisional governments or subdivisions of the city of Guthrie to provide for the payment of certain warrants. The court say:

“The second assignment urged by plaintiffs in error for a reversal of this case is that the action in mandamus to compel the mayor and councilmen of the city of Guthrie to levy a tax to create a fund to pay these warrants, accrued on the 9th day of September, 1895, the day W. H. Gray, receiver, commenced his action in mandamus to compel the then mayor and council of the city of Guthrie to levy this same tax for the payment of these same warrants; and that consequently, at the time of the commencement of this action, it was barred by the Statute of Limitations. With this contention we cannot agree. The Statute of Limitations is what is known in law as a statute of repose. It is a statute enacted as a matter of public policy to fix a limit in which an action must be brought or the obligation will be presumed to have been paid. The statute is intended to run only against those who are neglectful of their rights, and fail to use reasonable and proper diligence in the enforcement thereof. They are based upon the presumption of law that, from the lapse of time, it is fair to presume that the debt has been paid. In this case the warrants show upon their face that they were issued by what purports to be the city council, and signed by what purports to be the mayor, and attested by what purports to be the clerk; that they are evidences of indebted-

ness, and are entitled to be accepted as evidence of indebtedness; that they are to be paid from a special levy for the payment of city warrants under the provisions of chapter 14 of the Statutes of Oklahoma of 1890, providing for the payment of indebtedness of the provisional government of the cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill. Now, when did, under these warrants, the right to demand payment thereof accrue? Was it immediately upon the issuing of the warrants, or was it when the fund from which said warrants were to be paid was in the hands of the proper officer for payment thereof? The payment of these warrants did not depend entirely upon the action of the holders thereof, but depended upon some affirmative action on the part of the officers of the city. The issuing of these warrants, making them payable out of a certain fund to be raised by a certain levy, indicates that a duty devolved upon the officers of the city to make the necessary orders and take the necessary steps which are prerequisite to the levying and collecting of that tax. Now, can the officers of the city, when steps are taken which are necessary preliminaries to the collection of these warrants, be heard to take advantage of their own neglect of duty by saying that, because we have not performed the duty as the law required of us and made the necessary levy to provide the fund for the payment of these warrants, that consequently, on account of our neglect, the Statute of Limitations has run against the holders of these warrants so as to prevent their collection?

“We think this case comes clearly within the decision of this court in the Greer County case;

that is, Greer County v. Clarke & Courts, 12 Okla. 197, 70 Pac. 206. There this court said: 'Where the warrant is issued by the officers of a municipal, or quasi municipal, corporation, and the creditor accepts the same, relying on the ordinary modes of taxation to pay said obligation, the municipality cannot be heard to say, on an action to enforce the payment thereof, that it is barred by the Statute of Limitations, without first pleading and proving that it has provided a fund for the payment of such indebtedness. \* \* \* Hence, a county cannot plead the Statute of Limitations to an action against it to enforce an obligation payable from a particular fund, without first showing that it has provided such fund.' In Robertson v. Blaine County, 47 L. R. A. 459, 32 C. C. A. 512, 61 U. S. App. 242, 90 Fed. 63, it was held that a county cannot plead limitation to an action against it to enforce an obligation payable from a particular fund without first showing that it has provided such fund. In the case of Hubbell v. South Hutchinson, 64 Kan. 645, 68 Pac. 52, the Kansas Supreme Court held that the Statute of Limitations will not start to run in favor of a city on its outstanding warrants until it has money in its treasury to satisfy such obligations. In the course of the opinion the court said: 'This action was based upon certain written obligations, and, in the absence of intervening circumstances, would become barred within five years from the date of their issuance. It is the settled law of this state, however, that the Statute of Limitations does not run in favor of a municipal, or quasi municipal corporation upon its outstanding obligations, until the corporation has provided a fund with which



payment thereof may be made.' In the case of School Dist. No. 5 v. First Nat. Bank, 63 Kan. 668, 66 Pac. 630, in a decision by the Supreme Court of the state of Kansas, we find the following language in the opinion. 'Statutes of Limitation give the defendant a right to resist the payment of a demand based upon some act of negligence or omission of the plaintiff. But in the case at bar the defendant would found its right to defeat the claim sued on by asserting its own negligence. It has never set the machinery of the law in motion to collect the money required to meet its obligations. It has remained since the debt was contracted in a continued state of insolvency, created by its own act.'

"From the foregoing, it will be seen that the reason assigned by the courts in refusing to permit the Statute of Limitations to be pleaded as a bar to recovery in cases of this character arises out of the fact that the defendants were, under the law, required to do some affirmative act,—that is, to levy a tax creating a fund for the payment of indebtedness and the taking up of warrants,—and, if the warrant holder failed to present his warrant and secure the money thereon, the Statute of Limitations could be successfully interposed. But, so long as there remained, under the law, some act to be performed by the municipality, such municipality has not performed its duty under the law, and the courts will not and ought not to permit them to interpose their failure to act as by law required as a defense to the payment of a just obligation. \* \* \*

*"Now, we think that an action in mandamus is simply a preliminary step towards the enforcing of*

*payment of these warrants, and, if the Statute of Limitations could not be urged as against the collection of the debt evidenced by the warrants, then it should not be urged as against the necessary preliminary steps towards the collection thereof.*

\* \* \* Inasmuch as, under the law, it was the duty of the mayor and council of the city of Guthrie to levy a tax, it is wholly immaterial, it seems to us, whether the duty arises by reason of a contractual obligation, or by reason of a statute. In either case, the duty is the same. \* \* \* The duty of the mayor and city council to levy a tax is imperative, and the principle governing the application of the law rests upon the doctrine of negligence upon the part of the city council and the mayor. \* \* \* (Citing and quoting from *Freehill v. Chamberlain*, 65 Cal. 603, and *Lincoln County v. Luning*, 133 U. S. 529.) \* \* \* This, it is admitted, the officers of the defendant city of Guthrie have failed entirely to do; and now they seek to interpose their negligence as a defense, and to do this under the name of the Statute of Limitations. It would seem unnecessary to further cite authorities after the decided and emphatic manner in which our own Supreme Court, in the *Greer County* case, has decided this question. *It would seem to us that this decision ought to settle the law upon this point in this territory.*"

Plaintiff in error contends (pp. 92-93 Brief) that even assuming these bonds to be payable out of a particular fund, the creditor cannot maintain an action for a money judgment when he alleges that there is no money in the only source from which they are payable.

In this connection we desire to call the court's attention to the case of Meyer v. City and County of San Francisco, 150 Cal. 131. That was an action to recover of the defendant the amount due upon thirteen Dupont street bonds of the same issue as those involved in the cases of Mather v. City and County, and Eddy v. City and County, *supra*. No plea of the Statute of Limitations was directly involved in the case. A general demurrer to the complaint had been overruled by the court below, the defendant answered, and thereafter judgment was entered for plaintiff upon the pleadings. The appeal was from that judgment. The Supreme Court held that there was no general obligation upon the part of the defendant to pay the bonds, as they were to be paid out of a special fund to be raised by certain officers by means of a special tax. In passing upon the ruling of the lower court on the demurrer the court say:

"No breach of duty is alleged except the failure to pay the bonds. Under the provisions of the act that duty could not arise until there had been sufficient funds raised by the special tax applicable to these bonds to pay the same. (Citing case.) This fund may or may not have been raised. It is not alleged, and it is not to be presumed."

But held that the action could be maintained not to enforce payment of the bonds but to establish and perpetuate them as a claim upon the funds to be raised under the act in order to prevent the bar of the Statute of Limitations, which, so far as appeared from the complaint, was then running, and which the

court held would not be suspended under certain specified conditions which it anticipated might be found to exist, and which were doubtless suggested by the allegations of the answer in that case. In this connection the court say:

“But although no action could be maintained to recover a general judgment against the city for the money due on the bonds, and the complaint is insufficient to authorize a writ of mandamus, conceding that a mandamus suit to enforce payment of the bonds would lie against the city in any case, we think that the plaintiff may nevertheless maintain an action against the city on the bonds, not to enforce payment thereof, but to establish and perpetuate them as a claim upon the funds to be raised under the act, and to prevent the bar of the Statute of Limitations. At the time the action was begun but one day remained of the period of limitation. By the expiration of that period the plaintiff would have been barred forever of all right to enforce payment of the bonds, which the demurrer admits to be valid and unpaid. The delay was not the fault of the plaintiff. Circumstances might exist under which it would not be the fault of the defendant or its officers, and in which plaintiff could not force payment by mandamus,—as, for instance, if the officers, although exercising reasonable diligence, had been unable to collect the tax until after the period of limitation had run. In such a case the plaintiff would be practically without remedy if he could not maintain an action to prevent the running of the statute against him. Justice requires that he shall have some means of preventing his claim from becom-



ing outlawed. No better or more appropriate remedy can be suggested than that of an action of the character above indicated.”

The answer in the case alleged, as the opinion shows, that the levies provided for in the act were regularly made each year for the twenty years as required upon all the lands of the district, and that the tax had been paid upon all of said lands, except that levied upon certain lands protected by judgments perpetually enjoining the tax collector and his successors in office from collecting from those lands any tax levied under the act. It there appeared that the city and county of San Francisco exhausted its power in its endeavor to provide the fund from which the Dupont street bonds were to be paid. In other words, if the particular fund rule applied at all, the defendant fully complied with its requirements by alleging that it had pursued the method prescribed for the raising of the funds.

In the case of Nevada National Bank etc. v. Board of Supervisors, 5 Cal. App. 638, a case in which the board of directors of an irrigation district had refused to levy an assessment to pay interest on its bonds and a writ of mandate directing the supervisors of the county to make the levy was sought, the court say:

“It seems to be established by the authorities that the proper course to pursue when municipalities refuse to pay their bonds is by an action at law to establish the validity of the bonds and the amount due thereon, and then to apply for a writ of mandate to compel the proper authorities to raise what is required to satisfy the debt by the

assessment and levy provided by statute. (Citing cases.)

Defendant cites the cases of *Mather v. San Francisco*, 115 Federal 37, and *Eddy v. San Francisco*, 162 Federal 441, as indicating that this court had departed from the rule laid down in *Robinson v. Blaine County*, 90 Federal 63, and also as establishing the proposition that neither the case of *Lincoln County v. Lunning*, *supra*, nor the particular fund doctrine is applicable to California municipal bonds. It would seem very strange that this court should make such an important ruling without so stating in express words, for in neither of the two cases cited is the special fund doctrine discussed by the court, nor are any particular fund cases even mentioned by the court. The latter case (*Eddy v. San Francisco*) was evidently decided upon the doctrine of laches, and the court there mentions certain facts which seem to put a special character upon the bonds there involved. After quoting certain portions of the act under which the Dupont street bonds were issued, referring to the levy, assessment and collection of taxes, the court says:

“The duties of making these assessments and levying and collecting these taxes were purely statutory duties, created, not by municipal obligation, but primarily by a board of commissioners proceeding under a state statute. It is true the statute directed that the mayor and auditor and the city and county surveyor should constitute the board of Dupont street commissioners; but it also provided that they should each receive a compen-

sation of \$2,000 for their services. The services of these officers as a board of commissioners were, therefore, not municipal services for which they were otherwise compensated, but were special services under the act of the legislature. It seems to me that the facts of this case bring it within the doctrine declared by the Supreme Court in the case of *Peake v. New Orleans*, 139 U. S. 342, 11 Sup. Ct. 541, 35 L. Ed. 131, where the city of New Orleans was held to be a compulsory trustee, as distinguished from a voluntary and contractual trustee, as afterward found in *Warner v. New Orleans* and *New Orleans v. Warner*, *supra*.

\* \* \* Then after referring to the legislation which brought the city of New Orleans into relation with the drainage work and the assessments to carry it on, the court said: 'The obligations cast upon the city were purely statutory, and while they were, in respect to the party doing the work, and the collection of assessments, somewhat in the nature of a trust, they are more to be regarded as statutory obligations, a failure to discharge which puts less strain on the moral sense. \* \* \* If ever there was a case in which the responsibility of a city should be narrowed, this is one. By the legislation of the state it was denuded of all freedom of action. It had no choice of contractor or price. Neither the property to be taxed, nor the means or method of collecting the assessments was intrusted to its discretion. This is not a case in which there was a failure on the part of the legislative body, the city council, to prescribe and provide sufficient machinery for the collection of assessments. No superintendence of the financial department or the collection thereof was intrusted

to the municipality. All this financial power was placed directly, by state action, without its consent, in one of its official boards. Thus denuded of freedom of action it may properly insist upon the narrowest limits of responsibility. If the financial duty was devolved, without its consent, upon one of its administrative boards, and such board was derelict of duty, it may properly say to a complaining party, your remedy was mandamus, to compel prompt and efficient action by that board.'

"If I am correct in my opinion that the law of the Peake case is applicable to the present case, it follows that the duty of assessing, levying, and collecting the Dupont street taxes was a statutory duty imposed upon certain officers of the city and county of San Francisco, and that the defendant was not a voluntary or contractual trustee, and is not liable as such, upon the facts stated in the bill of complaint."

We respectfully submit that neither the case of *Mather v. City and County*, nor the later case of *Eddy v. City and County*, militate in any way against the authority of *Robertson v. Blaine County*, *supra*.

It may also be interesting to note that the Dupont street bonds were a legal tender in payment of taxes (Sec. 13, St. Cal. 1875-6, page 440) as in the case of *Goldman v. Conway County*, 10 Fed. 888, cited by counsel on page 138 of their brief, and further that the Dupont street fund, while special as to the city and county of San Francisco, was the only fund of the district created by the statute authorizing the issuance of the bonds, into which fund went all moneys of the



district, whether arising from the sale of bonds or collection of taxes, and from which were paid all warrants for damages, expenses of widening the street, etc., and the principal and interest on these bonds.

On page 68 of their brief counsel complain of the decision in the court below because they say that numerous irrigation districts in the state of California have proven dismal failures and that many of the issues of bonds were acquired by present holders at a tremendous discount from the original holders. It is not within the limits of our understanding to conceive that they contend any such facts to exist in this case. The undisputed evidence here shows that the bonds sued upon were given for water and pipe lines furnished the district. In fact, it is admitted and stipulated by plaintiff in error,

“that the consideration that said district received for the bonds issued and which the bonds mentioned in this suit are a portion, was six hundred and fifty inches of water, pipe lines, rights-of-way and other property and easements used in connection therewith. \* \* \*”  
[Tr. p. 52.]

These have been in use for twenty years and no complaint as to their efficiency or value has ever been suggested in this case.

The evidence also shows that the lands of the Rialto Irrigation District by means of the water and pipe lines so purchased with these bonds were from a desert converted into one of the most prosperous communities in Southern California with values of millions.

We quote from the testimony of the defendant in error, which is not attempted to be contradicted:

“I am acquainted with the property owned by the district. I value the water rights at \$925,000.00 for six hundred and fifty inches of water and the pipe lines and pipe system at \$175,000.00.” [Tr. p. 53.]

And again;

“There are about seventy-eight hundred acres in the district, and when this pipe line was first constructed the land was desert land and was hardly worth fifteen dollars an acre. There is now over three thousand acres which is worth easily \$1,000 an acre, and the balance of the district is worth \$200 to \$250 an acre, making an aggregate value of over \$4,000,000 in the district.” [Tr. p. 58.]

Counsel also complain that if the defendant in error here recovers what is justly due him, it can only be upon a theory which will entitle holders of bonds of other districts, which have been acquired by present holders at a discount, to come forward and assert their claims. We fail to perceive how this can affect the rights of the defendant in error, even conceding it to be true. Defendant in error here has been asserting his right to payment of these bonds for many years. The plaintiff in error on or about the 1st of January, 1895 (four years after the issuance of these bonds), ceased to have sufficient funds with which to pay, and passed a resolution to the effect that it would thereafter pay interest upon all overdue interest coupons from the time they became due until paid by said

district. [Stipulation, Tr. p. 52.] In 1900 the original complaint was filed in the case of Stowell v. Rialto Irrigation District in the Superior Court of San Bernardino county. The lower court decided the bonds to be invalid. This decision was reversed by the Supreme Court of California in 1909. The original complaint in the present action was filed in the lower court in 1908. Two other suits are pending between these parties in this court, which by stipulation [Tr. p. 44] are to follow the decision in the case at bar. One of those suits was filed previous to the case at bar and the other filed subsequently. Each case involves different installment and interest coupons from the same bonds. Demurrers, motions and the final decisions have been submitted upon briefs in these cases. The defendant in error has not been sleeping upon his rights. The irrigation district has been at all times vigorously contesting the right of recovery on these bonds by every conceivable technicality known to the law, and if we may be permitted to use the language of plaintiff in error, "with a force sufficient to deceive the very elect."

We think that very appropriate and applicable here is the language of Judge Bledsoe, now United States district judge, then presiding in the Superior Court of Riverside county, in referring to the general situation regarding irrigation districts that is part and parcel of the history of the state of California. The court, after passing upon a technical contention that the Wright Act was unconstitutional, says:

“In this connection it should be kept in mind that very soon after the ‘Wright Act’ of 1887 was adopted—it being the progenitor of the act here involved—a large number of irrigation districts were organized pursuant to the terms of such act; that thereafter, in due course, bond issues of most magnificent proportions were voted, *and that thereafter when the inevitable pay day came around, a more or less general disposition was evinced to adopt whatever means might be necessary to avoid the payment of many of the bonds which were theretofore in times of great hope and expectation duly authorized.* This disposition reflected itself in the neglect and refusal of districts to continue their corporate organization by failing to elect such officers and directors at the close of their terms, as provided by law, and thereby put it out of their own power to perform the duties and conform to the obligations imposed upon them through the machinery provided by law.”

Written opinion of the court filed in action of  
N. H. Twogood *et al.* v. Board of Supervisors  
of Riverside County, dated April 2nd, 1914.

Counsel attempt to throw a cloud of legal mystery around the main issues involved in this case, but when the light of reason is let in their contentions fade away, and it becomes apparent that to hold these bonds or coupons outlawed would be to violate the principle of the decisions rendered before the bonds were issued and which have ever since been consistently followed by both state and federal courts, and would take away vested rights of those who have dealt in these securi-



ties upon the faith of the doctrine so established—a doctrine supported by *stare decisis* and, we believe, correct in the reasons upon which it is based.

The following quotation from the case of Tulare Irrigation District v. Shepard, 185 U. S. 1, 46 L. Ed. 773, also seems applicable here:

“In the case of Douglas County v. Bolles, \* \* \* a case involving facts somewhat similar, this court said: ‘Common honesty demands that a debt thus incurred should be paid.’ That sentiment has lost no force by the lapse of time, and we think it applies in its full strength to this case.”

Plaintiff in error has set forth on pages 141 to 147 of its brief a statement of the amount of our claim which it contends is barred by the provisions of the Statute of Limitations. We do not think it necessary for the court or for us to verify this statement, for the reason that a reversal would involve the entry of a different judgment by the court below, and if this court should lay down a general rule, it would be a mere matter of detail to prepare a new judgment in accordance with that rule.

While, as stated by counsel, we did call the attention of the court below to the distinction between the method of the administration of the remedy of mandamus in the state and federal courts, and while the court recognized that distinction, nevertheless, it held the bonds involved here to be within the particular fund rule, and it is upon that broad doctrine that we here base our right to an affirmance of that judgment.

DATE OF ISSUANCE OF BONDS AS AFFECTING THEIR  
VALIDITY.

Plaintiff in error contends that the bonds are invalid because they do not bear date at the time of their issuance and do not run for the term prescribed by the statute. Although this was the precise point settled by the Supreme Court of California in the case of *Stowell v. District*, 155 Cal. 215, an action in which the defendant in error here brought suit against this same district upon bonds of the very issue here involved, plaintiff in error makes the contention that the court in that case in deciding this point passed only upon matters appearing on the face of the bonds.

Portions of the transcript in the case of *Stowell v. District*, *supra*, were by stipulation introduced in evidence in the case at bar and are contained in the transcript filed herein. [Page 58 *et seq.* of Transcript.] The testimony in the case of *Stowell v. District*, *supra*, showed deliveries of the bonds from 1895 to 1897, inclusive. [Page 60, Tr.] The finding of the lower court in that case as to the time of delivery of the bonds was as follows:

“Said alleged bonds were signed by the president and secretary of defendant on or about December 21, 1890, and none of them were signed prior to that date; and some of said bonds were disposed of and delivered in the manner hereinafter found, on or about December 22, 1890, and some of them subsequent to that date, and none of them were disposed of or delivered prior to December 22, 1890.”

With this finding before it, and the evidence upon which it was based, the Supreme Court of California says:

“The points made by respondent are that the bonds do not ‘bear date at the time of their issue,’ as required by the act, and that they were made payable at periods longer than those authorized by the statute.”

And after stating that the interest did not begin to run on the bonds until January 1st, 1891, and that the installments of principal were made payable in the required periods after that date, the court holds that the issuance of the bonds in that form and manner was a substantial compliance with the statute.

Counsel’s whole argument upon this point is founded upon an erroneous conception of the true meaning of the word “issued” as used in the Wright Act. In statutes similar to the one under consideration this word is used in two distinct senses. Bonds are sometimes said to be “issued” when they have been merely authorized and prepared, with the date from which they are to run. When they are actually delivered to a purchaser they are said to be “issued” to him. The case of *Yesler v. City of Seattle*, cited by the Supreme Court in *Stowell v. District*, is very clear on this proposition. The case is reported in 25 Pacific 1014. The Supreme Court of Washington, speaking through Justice Stiles, says:

“The statute requires that such bonds shall ‘bear the date of their issue,’ and it has become a question in this case what the date of issue is,

since the bonds were prepared with the date July 1, 1890, \* \* \* although none of the bonds have been delivered, and some of them will not be delivered for many months. In financial parlance the term 'issue' seems to have two phases of meaning. 'Date of issue,' when applied to notes, bonds, etc., of a series, usually means the arbitrary date fixed as the beginning of the term for which they run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery, and we see no reason why the Act of March 26, 1890, should not have that interpretation. When the bonds are delivered to the purchaser, they will be 'issued' to him, which is the other meaning of the term."

The case of *Sechrist v. District*, 129 Cal. 640, is not contrary to this doctrine. That was an action instituted by taxpayers and landowners of the district to have bonds of the district declared invalid. The contention was made by defendants, holders of the bonds, that the action was barred by the Statute of Limitations since the bonds were "issued," to the extent of being authorized and prepared, in December, 1890, and the suit had not been commenced until seven years thereafter. But the court held substantially on this point that since the right of action against the holders to have the bonds adjudged void did not accrue to a landowner or taxpayer of the district until those bonds were delivered, the bonds were not "issued to the holders" so as to start the running of the statute until they were delivered. The court in that case was not



called upon to construe the word "issued" as used in the Wright Act, and the court's attention was not directed to the construction which necessarily must be placed upon that term as there used in order that effect may be given to all of the provisions of the act, but on the contrary the court was concerned only with the proposition that the bonds had not been "issued to the purchasers" so as to start the running of the Statute of Limitations to bar an action against such purchasers. Anything further than this in the decision is dictum solely, as is made evident by the subsequent decision of *Stowell v. District*, above, in which the question as to whether the bonds bore the "date of their issue" was directly before the court. In that case the court decided the point upon the theory that the date of issue was the time when the bonds commenced to run, and the court did not take into consideration the date of delivery in determining the date when the bonds were "issued," within the meaning of the statute. The court, after stating that the language in the body of the bond, if it stood alone, would make the installments of principal payable at the end of the respective periods named from and after November 17, 1890, and that if this date was to be taken as the date of issue of the bonds, the installments of principal would be made payable at a time later than that fixed in the Act for the payments, says:

"But in determining the true effect of any written instrument, the entire writing must be considered. Here we find that, while the nominal date of November 17, 1890, is stated in the bond,

the first payment of semi-annual interest fell due on July 1, 1891. The bonds, therefore, did not begin to bear interest until January 1, 1891, and the installments of principal were made payable in the required number of years after that date. Under these circumstances, the bonds are to be regarded as, in effect, *issued* on January 1, 1891, which may be treated as their real date, in contradistinction to the nominal date of November 17th, 1891. That the execution and issuance of the bonds in this form and manner was a substantial compliance with the statute, both as to date and term of running, is a view well sustained by authority."

The "issue" of bonds referred to in the Wright Act clearly includes only the authorization of the bonds, their preparation, and the date from which they are to run. This is made clear by the language of the act:

"At such election the ballots shall contain the words 'Bonds—Yes,' or 'Bonds—No,' or words equivalent thereto. If a majority of the votes cast are 'Bonds—Yes,' *the board of directors shall immediately cause bonds in said amount to be issued.* \* \* \* They shall be numbered consecutively as issued, and bear date at the time of their issue."

Section 15.

"The board may *sell* said bonds *from time to time*, in such quantities as may be necessary and most advantageous to raise money. \* \* \*"

Section 16.

It thus appears that there was no limit placed by law on the time when the bonds might be sold and delivered, although they must be issued to the full amount immediately after the election so that they will be ready for sale. The act contemplates that the district must have time after the issuance of the bonds in which to place them on the market, find purchasers, sell and deliver them, and so provides that they may be sold from time to time.

If the contention of defendant be correct that "issued" as used in the Wright Act refers to delivery to a purchaser for value, it would be difficult to understand how the board could "sell said bonds from time to time" if they are also to comply with the provision of section 15 of that act, that upon receiving the result of the election in favor thereof they "shall immediately cause bonds in said amount to be issued." Such an interpretation of that term as used in the Wright Act would also make it possible for the bonds to bear different dates and mature at different times, since the act provides that they may be sold from time to time, and defendant contends that they must be dated at the time of delivery. But an examination of the act itself shows that it was not intended that the bonds should be payable at different dates. The act provides:

"Said bonds shall be payable in gold coin of the United States, in installments as follows, to-wit: At the expiration of eleven years not less than five per cent of said bonds; at the expiration of twelve years not less than six per cent. \* \* \*

and for the twentieth year a percentage sufficient to pay off said bonds. \* \* \*

Section 15.

“The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds; and *at the expiration of ten years after the issuing of bonds by the board, must increase said assessment for the ensuing ten years, in the following percentage of the principal of the whole amount of bonds then outstanding,* to-wit, for the eleventh year, five per cent; for the twelfth year, six per cent; \* \* \* and for the twentieth year a percentage sufficient to pay off said bonds. \* \* \*

Section 22.

Assuming that defendant's contention be correct, that the bonds must be dated at the time of delivery and must run from that time, and for the purpose of illustration suppose that the board of directors under the authority conferred by the Wright Act to sell the bonds from time to time, deliver and, therefore, date some of the bonds in 1891, and sell, deliver and date others in 1900—we then have this state of affairs: the board of directors in conformity to the provisions of section 22 above quoted, in the twentieth year after the delivery of the bonds, which would be in 1911, must levy an assessment sufficient to pay off the whole amount of bonds then outstanding, though the bonds delivered in 1900 have still about ten years to run. Such an interpretation would defeat the obvious intention of the legislature, which was to levy each year



only an amount sufficient to pay off the accrued interest and the matured installment of principal.

The only construction of the term "issued" as used in the Wright Act which is consistent with and gives effect to all of the provisions of the act is that which limits the meaning of the word to the authorization and preparation of the bonds, including the date from which they are to run. When the bonds are sold from time to time, after being issued, the question of the payment of principal and interest which may have matured between the date of issue and the date of sale must be adjusted by payment of the face of the bond and interest by the purchaser or the removal of the matured coupons, as was done in the case at bar.

In a case decided in 1897 the Supreme Court of California clearly states a proposition showing that "issue" and sale of bonds are two different matters. The case is *In the Matter of the Organization, etc., of the Central Irrigation District*, 117 Cal. 382. The action was instituted under the Confirmation Act, to confirm proceedings taken under the Wright Act, and as the district had already sold some of the bonds and had delivered them and the bonds had passed into the hands of *bona fide* holders, and as these bondholders were not parties to the action the court refused to pass upon the validity of the bonds themselves, and said:

"The Confirmation Act contemplates a review by a court of the proceedings attending the issue of bonds, whether the bonds have actually been sold or not. *After the issue, and before the sale*, of any bonds it may well be of advantage to the

district and to intending purchasers that the judgment of a court should be invoked to pass upon the regularity of the action of the district officers, but after sale different questions present themselves."

That the legislature of California has kept well in mind the distinction between "issue" and sale or delivery is evidenced by the language of the act passed in 1897, and which is really supplementary to the Wright Act. This act (Stats. 1897, p. 394) provides substantially that irrigation districts which have been organized under the Wright Act and which have bonds, coupons, or other evidences of indebtedness outstanding, may fund the same by a new issue of bonds, to be delivered in lieu thereof. Section 12 of this act provides:

"It shall be unlawful to *sell* or exchange any of the bonds *issued* as herein provided, for less than their par value."

Plaintiff in error makes the point that some of the bonds in question were delivered under an agreement, which provided that certain property should remain the property of N. W. Stowell until the bonds received, or to be received, shall have been paid, and that therefore the bonds delivered under this agreement are void. This point is made under point 3, pages 158-161, of their brief.

We submit that plaintiff in error cannot raise this question in view of the stipulation appearing upon pages 52 and 53 of the transcript of record. This stipu-

lation was entered into prior to the trial of the case, and contains the following provision:

“That the consideration that said district received for the bonds issued and which the bonds mentioned in this suit are a proportion, was six hundred and fifty inches of water, pipe lines, right of way and other property and easements used in connection therewith.”

The contract to which reference is made, together with other documentary evidence, was taken from the transcript in the case of *Stowell v. Rialto Irrigation District* in the Supreme Court of the San Bernardino county [Transcript, page 73], which was subsequently disposed of by the decision of the Supreme Court of the state of California, appearing in 155 California, page 115; and this particular contract, together with the other documentary evidence offered from the said transcript, was offered as we supposed for the purpose of showing the manner in which property was transferred to the district.

The proposition made by the plaintiff in error under point 3 was not made in the lower court, and we submit that in view of the stipulation it cannot be made here. Further, notwithstanding the contract referred to by plaintiff in error, there is nothing in the record to show that the title to the particular property described in that contract has not passed to the district, and under the stipulation it should be assumed that the district had received the consideration mentioned in the stipulation. Again this particular contract was before the Supreme Court of California in the case

referred to and that court held the bonds issued by the district valid.

Under Point IV counsel say that the court erred in rendering its findings and judgment for the reason that no judgment of the Superior Court declared these bonds to be valid.

If we understand the position of counsel it means that the confirmation provided for by statute is necessary for the validity of the bonds.

The act providing for the confirmation of proceedings for the issue and sale of bonds appears in the statutes of California of 1889, page 212. Section 1 of that act provides that the board of directors of an irrigation district *may* commence a special proceeding for the purpose of having the proceedings for the organization of the district and the sale of the bonds judicially determined, but it nowhere appears that such action is in any way a prerequisite to the validity of the bonds. Even if it should be assumed that the objections made to the manner in which the judgment of confirmation was obtained were well taken, it would not follow that the validity of the bonds were thereby affected.

Counsel say that as the confirmation action was filed December 12, 1890, none of the bonds in suit were then in existence. It does not lie in the mouth of the Rialto Irrigation District to make such a statement. The facts are briefly these: the board of directors of the district did issue the bonds sued on—

“The defendant \* \* \* by its board of directors



\* \* \* issued a bond of said district \* \* \* in words and figures following.” (Copy of bond follows bearing date November 17th, 1890.) [Amended complaint, Tr. pp. 19-22.]

“Admits that the board of directors and officers of the defendant acting in the name of the defendant issued the bonds referred to in said amended complaint.” [Answer to amended complaint, Tr. p. 33.]

Upon the 12th day of December, 1890, this very district which is now alleging that its bonds are invalid filed in the Superior Court of San Bernardino county, California, its petition wherein it asked that the validity of its bonds be determined, and on the 8th day of January, 1891, it procured the entry of a judgment of that court [duly given, made and entered, Tr. p. 121] to the following effect:

“That all proceedings which might affect the legality or validity of said bonds \* \* \* have been examined and determined by the court and that all of said proceedings were legal and valid and confirmed.” [Tr. p. 122.]

The district admits the issuance of a bond bearing on its face a date prior to the filing of its own petition for confirmation, and we do not think that this court is going to indulge the presumption that the Superior Court of San Bernardino county stultified itself by adjudging the validity of all proceedings which affect the validity of the bonds when it did not have the bonds before it.

This question of the validity of the bonds as affected by their date and the time of their maturity is discussed elsewhere, but independent of that, we submit that the plaintiff in error is estopped by its own conduct in obtaining a decree of court establishing the validity of these bonds, a public record which was notice to the world and which it is to be presumed was relied upon by the purchasers, from now asserting that it was not entitled to that decree. The repudiation of an obligation honestly entered into seems to necessitate the taking of many inconsistent positions by the repudiator.

We do not discuss the points made by counsel in reference to the invalidity of the bonds in the hands of the defendant in error because the only defects relied upon are those claimed to have arisen out of the method by which this defendant in error acquired them or those which appear on the face of the bonds themselves, which, of course, would be available no matter how they were acquired.

We respectfully submit that the judgment should be affirmed.

J. W. SWANWICK,  
*Attorney for Defendant in Error.*



UNITED STATES  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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RIALTO IRRIGATION DIS-	}
TRICT, A CORPORATION,	
<i>Plaintiff in Error,</i>	}
VS.	
N. W. STOWELL,	
<i>Defendant in Error.</i>	

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REPLY BRIEF OF PLAINTIFF IN ERROR

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Filed

JAN 26 1916

F. D. Monckton,





No. 2491

UNITED STATES

# Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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RIALTO IRRIGATION DIS-  
TRICT, A CORPORATION,

*Plaintiff in Error,*

VS.

N. W. STOWELL,

*Defendant in Error.*

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## REPLY BRIEF OF PLAINTIFF IN ERROR

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### Statute of Limitations

In our opening brief in this action, we discussed at (some length the subject of the Statute of Limitations and, in so doing, anticipated, to a great extent, contentions which might be made by our opponent, in order that he might be thoroughly informed of our position in the premises, and thereby enabled to avail himself of any appropriate argument, with which to combat our views, in making his reply. Notwithstanding the op-

portunity thus afforded him for advancing grounds for sustaining the decision of the learned District Court herein, on the subject of the Statute of Limitations, an examination of his brief will, we respectfully submit, disclose a striking absence of any substantial reasons which justify the decision on that subject, or which vindicate the extraordinary supposition that the cause of action of the defendant in error is endowed with the attribute of immortality.

If the law be as defendant in error contends, then unquestionably, there is at last discovered what the Federal Supreme Court (in *Campbell vs. Haverhill*, 39 L. Ed. 280) facetiously terms:

“The anomaly of a distinct class of actions *subject to no limitation whatever*; a class of privileged plaintiffs who, in this particular, are outside the pale of the law and subject to no limitation of time in which they may institute their actions.”

Surely, if such a startling thing, which the same high court pronounces, is “utterly repugnant to the genius of our laws”, can possibly exist at all, its foundation should be something more than illogical reasoning unsupported by any parallel precedents, or well considered authorities.

Particularly is this true in this state where the Supreme Court holds that the Statute of Limitations will run against the collection of taxes, even though such taxes are made a lien upon property and the law specifies such lien shall not be removed “*until the taxes are paid or the property sold for the payment thereof*”. (*City of San Diego vs. Higgins*, 115 Cal. 170; *Dranga vs.*

Rowe, 127 Cal. 506; Clark vs. San Diego, 144 Cal. 361.)

Upon the threshold of his discussion of the subject of the Statute of Limitations, defendant in error asserts that an irrigation district "is not a municipal corporation in the general sense in which the term is applied generally to municipalities exercising the ordinary functions of government". (Brief, p. 4.) It would seem rather late in the day to assert or intimate that an irrigation district is not a public municipal corporation, a state agency and "formed for the government of a portion of the state, as defined in Section 284 of the Civil Code". (People vs. San Joaquin, etc., Ass'n, 151 Cal. 805; In re Madera Irr. Dist., 92 Cal. 307.)

In County of San Mateo vs. Coburn, 130 Cal. 636, it is said:

"A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of *local* government."

In Union Trust Co. vs. State of Cal., 154 Cal. 729, it is said:

"All public corporations exercising governmental functions within a limited portion of the state—counties, cities, towns, reclamation districts, *irrigation districts*—are agencies of the state just as the board of works created by this act is such agency." (Italics in this brief are ours.)

It is also urged by counsel that the bonds of the district are payable *only* from a particular fund and that there is no power vested in the district by virtue of which



it can obtain funds for the payment of bonds except by the creation of what counsel calls a "Particular Fund". (Brief, p. 4.) This theory is frequently reiterated in the brief of defendant in error and he repeatedly plants himself squarely on this supposition and asseverates that "there is *no other fund*" from which the bonds can be paid (brief, p. 6); that they are *only* payable "out of the special fund provided for" (brief, p. 13); that the bonds belong to the class of obligations which are "payable out of a special fund" (brief, p. 14), and, in effect, the promise of the irrigation district to pay these bonds is purely a conditional one and is coupled with the proviso that "the fund out of which the payment is to be made shall have been collected". (Brief, p. 39.)

The last imaginary proviso at least denotes a certain element of consistency in the views of defendant in error for, as we pointed out in our opening brief, it would be highly illogical to say that an action can be brought and a personal money judgment recovered therein against the maker of an instrument, imposing a *general* liability, and at the same time to contend that, notwithstanding such cause of action had accrued, the Statute of Limitations would not be set in motion contemporaneously with the accrual of such cause of action. On the other hand, if such alleged proviso really exists, no cause of action for a personal judgment on the obligation would arise *until there was money in the fund* from which the same was exclusively and only payable, and in such case, there is room for argument that the statute would not commence to run until the fund was provided, because until then—

and not before—no cause of action would have accrued on such a conditional obligation. (See opening brief, pgs. 54, 62, 76, 92, 93.)

The situation which confronts defendant in error thus forces him to choose which horn of the dilemma seems to him the less dangerous—in fine: (1) whether he will contend that the instrument in question constitutes a “general” obligation, the source of payment of which is not confined to a specific fund, and hence can be sued upon regardless of whether or no such fund exists, in which event, the cause of action accrues upon maturity of the coupon and the statute is then set in motion, or (2) whether he will contend that the instrument is *only* payable from a particular fund and that the holder can look to *no other* source of payment whatever, in which case it would constitute a conditional non-negotiable instrument, and would carry with it *no personal credit* and thus no personal money judgment could be obtained thereon against the maker and no cause of action would accrue before such particular fund were provided, and hence, it might be argued then the statute would not operate. (See opening brief, pgs. 44, 45, 58, 59.) We say “might be argued” advisedly, as even in such a case, the California rule is that the statute will run. (Meyer vs. San Francisco, 150 Cal. 131; S. F. Savings Union vs. District, 144 Cal. 648.)

Defendant in error seems to be well aware of some of the distinguishing features which differentiate a “general” obligation from one that is “special” and which imposes only a limited liability, and, in addition to his

remarks already noted, regarding the supposed restriction of payment to the so-called “particular fund”, he unhesitatingly asserts—in his desperate efforts to avoid the consequences which would result from the obligations being held “general” ones—that “*no personal judgment can be recovered against plaintiff in error on these bonds*”, and that “though they are payable at a specific date, *they are not negotiable* in a commercial sense”. (Defendant in error’s brief, pgs. 20, 14.)

We respectfully submit that in attempting to escape from the hazards of Scylla, our opponent inevitably finds himself overwhelmed by the perils of Charybdis, for having firmly committed and nailed himself to the doctrine that the instruments sued on herein are “special” non-negotiable obligations, payable *only* from a non-existent fund, and carrying with them the assumed proviso that the promise of the district to pay is conditional upon “the fund out of which the payment is to be made *shall have* been collected” (opponent’s brief, p. 39) and that no personal judgment can be recovered against the district on these bonds, it necessarily follows that the judgment appealed from should be reversed if he is correct in his expressed views. (Kennedy vs. Sacramento, 10 Sawyer 32.)

It cannot be denied that the so-called “particular fund” has not been provided, and it is equally undeniable that our opponent has recovered a *general money judgment against the district* on these very obligations which he tells us contain a condition which furnishes a complete defense to his alleged cause of action on his own

admissions. Let it be once admitted that these instruments are not payable until “the fund out of which the payment is to be made shall have been collected”, it is then obvious no cause of action is alleged without averment of the collection of such fund. (See authorities cited in our opening brief, pgs. 39 to 44.)

In defiance of these authorities, our opponent persistently insists that although the obligations in this case upon his theories, can “*only be payable out of the special fund provided for*” (brief, p. 13), “and are not in law or fact, payable except as money is received into this specific fund” (brief, p. 16), yet he can still recover on them against the maker without showing or alleging that this fund exists or ever has existed, and he drives another nail into the coffin of his speculations by likening these bonds to warrants (brief, pgs. 14, 16, 17), which results in making the authorities mentioned, on pages 40 to 44 of our opening brief, still more applicable to this case, because those authorities hold that warrants payable “*out of a particular fund*” create no general liability against a municipality; that no action can be maintained “on the warrants themselves”, and that no liability exists until the particular fund comes into existence, in accordance with the well settled principle that when an obligation is payable “out of” a specified fund, the agreement is a conditional one and therefore it is incumbent on a plaintiff, suing on such a contingent contract, to aver and show that the contingency which fixes the liability of the defendant has occurred.



Not only is this a case where any showing of the existence of the alleged special fund is entirely absent, but it is also a case where the defendant in error is attempting to justify the rendition of a general and personal money judgment against the district, thereby stultifying his own position when he asserts that "no personal judgment can be recovered against the plaintiff in error on these bonds" (brief, p. 20), and when he also attempts to distort extracts from our brief into an admission on our part "that no general judgment can be recovered here". (Brief, p. 20.) It is obviously ridiculous to pretend that the judgment appealed from is not both "personal" and "general". (Transcript, p. 50.) It is equally futile to deny that, if our opponent's views be correct, the case of *Meyer vs. San Francisco*, 150 Cal. 131, upon which he relies, is absolutely opposed to the iridescent notion that a plaintiff can recover a general money judgment against the maker of an instrument which carries with it no personal credit of liability. Extensive quotations are made on pages 46 to 48 of our opponent's brief, from the opinion in the last mentioned case, and an examination of that case will disclose that the court held:

(1). That no cause of action for mandamus was alleged against the city, because (just as we contend here) no averment appeared in the complaint that the fund from which the bonds there were payable had been raised, hence no breach of duty was shown. (150 Cal. 134.)

(2). That no general or personal money judgment can be recovered against a city on bonds, payable out of

a special fund, where the payment of such bonds is confined to such fund and the debt is not otherwise payable and recourse against the city is waived. (150 Cal. 135.)

(3). That in such a case, although a personal money judgment cannot be recovered against the city on bonds which do not constitute *general* obligations, yet the city can be sued for the purpose of recovering—not a general money judgment—but “only a judgment judicially establishing the plaintiff’s debt”. (150 Cal. 136.)

(4). That a general money judgment obtained on such bonds cannot be upheld and must be reversed. (150 Cal. Syllabus, pgs. 132, 134, 140.)

(5). That notwithstanding the fact a general money judgment was not obtainable on such bonds and that they were to be paid out of a special fund to be raised by taxation upon lands within a certain district of the city, yet *the Statute of Limitations ran against such bonds*. (150 Cal., pgs. 135, 136.)

This decision of the California Supreme Court is of peculiar interest here, as the same issue of bonds (Dupont street bonds) were there involved as were before this Circuit Court of Appeals in *Mather vs. San Francisco*, 115 Fed. 37. In our opening brief (p. 104), we discussed the *Mather* case and showed that the same argument, against the running of the statute, was made there as is made in the case at bar and that this Court held that the statute ran against bonds which were payable from a fund which bore infinitely closer resemblance to what, in contemplation of law, is called a “par-

ricular fund” than any fund from which the bonds in the case at bar are payable, and that the decision of this court was reached after the plaintiff in error, in the Mather case, had advanced the identical views, regarding the particular fund doctrine, as are now contended for by our opponent. We thus find that the views of the California Supreme Court and this court accord on this subject—both courts holding that the statute ran against those bonds. The California court, on page 136, cites the Mather case, and in referring to it, says:

“The latter was an action upon some of the Dupont street bonds, of which the bonds in suit in this case at bar form a part. Upon similar reasoning we can say that the provision that the bonds here involved should be issued in the name of the city and county implies that the city and county can be sued when necessary to preserve the plaintiff’s rights and *prevent the bar of the Statute of Limitations*, and that in such action, a judgment can be given establishing the debt for that purpose.”

The California Court, on page 135, also says:

“We think that the plaintiff may nevertheless maintain an action against the city on the bonds, not to enforce payment thereof, but to establish and perpetuate them as a claim upon the funds to be raised under the act, and *to prevent the bar of the Statute of Limitations*. At the time the action was begun but *one day remained of the period of limitation*. By the expiration of that period the plaintiff *would have been barred forever* of all right to enforce payment of the bonds, which the demurrer admits to be valid and unpaid.”

When it is observed that in the case at bar, the coupons are *general* obligations and do not merely constitute an obligation against a portion only of the property of the corporation issuing them—as was the case in the Dupont street bonds in the Mather decision—and that their payment is not confined exclusively to any special fund and that—unlike the Dupont street bonds—no claim against the maker for any part of the debt was waived, we respectfully submit that no rational argument can be advanced why the principles already announced by this court and the California Supreme Court do not apply to the case at bar with redoubled force, for if a cause of action accrues and the statute runs against obligations in spite of their being obligations, payable only from funds raised by taxation upon only a portion of the property of the maker and upon which no general money judgment can be obtained, but only a judgment establishing the debt, *a fortiori* it must run where, as in the case at bar, the obligations are not confined to any fund at all for payment; where they constitute express unconditional and general promises to pay upon specified dates, and mature at all events and absolutely on those dates according to contract and where there never has existed the slightest obstacle, fetter or impediment upon the right to sue at any time after their maturity in any court, and obtain a general money judgment thereon against the maker.

It is therefore difficult to see why the case of Meyer vs. San Francisco is cited by defendant in error to support his argument. If it is relied on as a precedent to



vindicate the obtaining of an ordinary money judgment on obligations, supposed by him to be exclusively payable from a particular fund, it is obvious he labors under a misapprehension as to what the court so plainly decided, as the court distinctly holds such a judgment is improper and says:

“The prayer is for an *ordinary judgment* against the defendant for the amount of the bonds sued on and for costs of the action. The bonds state on their face that they were issued under the provisions of the act of March 23, 1876, for the widening of Dupont street, and that they were to be paid *out of the fund* to be raised by taxation as provided in that act.” (150 Cal. 133.)

After holding that there is no obligation on the part of the city to pay the bonds, the court, in referring to the debt evidenced by the bonds, says:

“It never became a general obligation of the city, to be enforced by a personal judgment against it, such as that prayed for in the complaint.

“The judgment so obtained *cannot be upheld* under the allegations of the complaint. Mandamus lies to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. To authorize a writ, the complaint must show an existing duty and a failure to perform the same on demand. (People v. Romero, 18 Cal. 91; Crandall v. Amador Co., 20 Cal. 75; Oroville etc. Co. v. Plumas Co., 37 Cal. 363.) No breach of duty is alleged except the failure to pay the bonds. Under the provisions of the act, *that duty could not arise until there had been sufficient funds raised by the special tax applicable*

*to these bonds to pay the same...* (Cramer v. Sacramento, 18 Cal. 384.) This fund may or may not have been raised. It is not alleged, and it is not to be presumed." (150 Cal., p. 134, 135.)

If defendant in error should try to differentiate the last case by contending—notwithstanding his numerous statements to the contrary with which his brief is embroidered—that the bonds here are “general” obligations and their payment is not confined to a special fund to be raised from taxation levied only against a part of the irrigation district, as was the situation in the case last cited, then he unavoidably admits what we contend for. In any event, however, whether the Dupont street bonds were or were not obligations payable from a “special” fund, both this court and the California Supreme Court hold that the Statute of Limitations runs against them. It thus appears that, viewed from any angle, the case of Meyer v. San Francisco is a decision which overturns the Campanile tower of sophistry and illogical arguments of defendant in error, to the effect that: (a) he can legally state a cause of action on an alleged conditional promise to pay without averring the performance of the condition; (b) he can obtain an ordinary, personal money judgment against the maker of paper, which he tells us is payable exclusively out of a non-existent particular fund and upon which he also says no personal judgment can be recovered against plaintiff in error; (c) the statute will not run in spite of the accrual of the cause of action.

Some attempts are made by our antagonist to find a basis for his startling theories by quoting portions of the Wright act and supplementing such quotations by statements to the effect:

(1), "That there is no power vested in the irrigation district by virtue of which it can obtain funds for the payment of bonds except by the creation of what we call the 'Particular Fund' out of which the bonds are to be paid" (Brief, p. 7);

(2). That in the directors of the district, there is vested "no general power by virtue of which they can raise funds for the payment of the bonds in question" (Brief, p. 7);

(3). That "the bondholder must have known that the only way by which he could collect his bond was through the way provided for in the act, viz., by the bond fund" (Brief, p. 13).

Such an attenuated line of reasoning in which our opponent indulges, is tantamount to a mere clutching at straws to keep his unsound doctrines afloat. As we understand his position, it would logically lead to the absurd conclusion, that although an irrigation district might have in its treasury the "wealth of Ormus and of Ind", yet until funds were transferred on its books to its bond fund—which after all is a mere matter of book-keeping—its bond holders would have no recourse against the district for the collection of the debt. The Wright Act contains nothing which justifies such ideas, nor is there anything in it which upholds for a moment the notion that no general power resides in the directors

under which they can raise funds for the payment of the bonds. Nor is the levying of assessments the only method of raising funds for paying these bonds. Section 41 of the Wright Act (Cal. Statutes 1887, p. 44) gives the directors the widest power of raising funds and provides that:

“Sec. 41. The Board of Directors may, at any time, when in their judgment it may be advisable, call a special election, and submit to the qualified electors of the district, the question, whether or not a special assessment shall be levied for the purpose of raising money to be applied *to any of the purposes provided in this Act*”. . . . The assessments so levied shall be computed and entered on the assessment roll by the Secretary of the Board, and collected at the same time and in the same manner as other assessments provided for herein; and when collected *shall be paid into the District Treasury* for the purposes specified in the notice of such special election”.

To the same effect is Section 59 of the Act of 1897, governing irrigation districts. (Statutes 1897, p. 274.)

Under Section 22 of the Wright act—which is set forth on pages 50 to 52 of our opening brief—the directors are also empowered to levy assessments to meet the maturing interest and principal of the bonds, and such assessment is not confined to a portion only of the property of the district, as was the case in the Dupont street bonds, as Section 17 of the Act (Statutes 1887, p. 37) provides:

“Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment



upon the real property of the district; and *all the real property* in the district shall be and remain liable to be assessed for such payments as hereinafter provided.”

The bonds recite this also upon their face and also state that they constitute “a lien upon *all said real property*”. (Transcript, p. 22.)

Furthermore, it is expressly enacted that irrigation districts are permitted to pay bond coupons and purchase bonds from rentals accruing from property leased by the district, as Section 4 of the leasing act (Statutes 1893, p. 296) provides:

“The rental accruing upon said lease may vary from year to year, as shall be specified in said lease, and shall be payable semi-annually, on the thirtieth day of December and thirtieth day of June of each year. All moneys collected as in this act provided, shall be paid into the treasury, and be used in the manner provided in section thirty-four of said act, except that the period of ten years, as mentioned in said section thirty-four, shall not be applicable to the provision of this act; *provided, however*, that if any coupons on any outstanding bonds of such district are at any time due and payable, and there shall for any reason not be sufficient funds in the interest fund to pay the same, the proceeds so collected, as in this act provided, *may be used to pay the same.*”

Such districts are also given power to sell property purchased by it at its tax sales, the law providing that as such purchaser, it “shall be entitled to the same rights as

a private purchaser” and that the title so acquired may be conveyed by deed, executed by its president and secretary. (Statutes 1889, p. 17.)

Again, such a district is permitted to sell any property held by it which the directors may determine is no longer necessary to be retained for the purposes of the district. (tStatutes 1909, p. 1075.)

In the light of these provisions, it is, we submit, useless to contend that the proceeds of such transactions cannot be applied to the payment of these bonds, or to say that the directors have “no general power by virtue of which they can raise funds for the payment of the bonds”. In what way, we ask, is their power any less *general* than the power of trustees of an ordinary municipality? As is the case with an ordinary municipal bond, these obligations are payable from money raised by general taxation, levied under *general* power vested in the directors of the district, against the entire property of all the landowners in the district. Everybody knows that an ordinary municipal corporation has different funds, including a “bond fund”, when bonded indebtedness is outstanding, to which money raised by general taxation is allocated. Does such fact bring the rights of the holder of ordinary municipal bonds under the so-called “Particular Fund Doctrine”, simply because a “bond fund” is provided for by law, which is to be used for paying such bonds? (See opening brief, p. 75.) Defendant in error ignores the distinction between making an obligation payable *only* from a particular

fund and making a fund applicable only to the payment of such obligation. (Opening brief, pages 52, 62.)

It will not do to say that these bonds are obligations which are “fundamentally different from the ordinary municipal bonds”, or that they are akin to warrants and are non-negotiable, etc. (Opponent’s brief, pgs. 14 to 17.) Such statements are ungrounded assumption, pure and simple. Counsel furnish us with no authorities, lending support, or even the slightest color, to such hallucinations. Who can consistently deny that these coupons and bonds are not “*general* promises to pay at all events, upon a certain day”, payable without condition, and that they mature according to contract like any other municipal bond? (See opening brief, pgs. 84, et seq.; also pgs. 40 to 43.) What similarity therefore exists between such instruments and warrants, when it must be admitted a warrant is a mere direction, addressed to an officer of the public corporation issuing it, to pay money out of some specific fund mentioned in the warrant, and when it is well settled such an instrument does not possess the incidents and qualities of negotiable paper; and when it is remembered that a warrant rarely specifies the date upon which it is payable?

It accordingly has been held illegal to issue bonds when the issuance of warrants was only authorized and that “a warrant is an order by which the drawer authorizes one person to pay a particular sum of money”. (Shawnee County vs. Carter, 2 Kas, 115.)

In Shelley vs. St. Charles County, 21 Fed. 699, says Mr. Justice Brewer:

“There is a vast difference between bonds and warrants. Warrants are general orders payable *when funds are found*, and there is propriety in the rule providing that they shall be paid in the order of presentation, the time of presentation to be indorsed by the treasurer on the warrants. But bonds are obligations *payable at a definite time*, running through a series of years.”

The California Supreme Court long ago held that an action would not lie on a warrant itself, the instrument not being payable absolutely, but only in case the designated fund was sufficient to meet it (opening brief, p. 43), and this Circuit Court of Appeals, in *Pauly Jail Bldg. Co. vs. Jefferson Co.*, 160 Fed. 866, affirmed a judgment of nonsuit, in an action brought on warrants, and held there could be no such thing as a refusal to pay the warrants “*until there is a fund available*” and quoted with approval the Washington Court, in distinguishing between a warrant and a negotiable note, saying:

“But there is this difference, a note can be sued upon, judgment taken, execution issued and property levied upon and sold, and the debt paid, but no action lies *either upon a warrant* or the original debt.”

It will therefore be <sup>8</sup>seen that this court concurs with the numerous authorities, cited on pages 40 to 44 of our opening brief, which hold that where an instrument, like a warrant, is payable only from a particular fund, an action cannot be maintained thereon until the fund is raised. (See also *Brooks vs. San Luis Obispo*, 109 Cal. 50; *Cramer vs. Supervisors*, 18 Cal. 385.)



In his zealous efforts to avoid the breaking down of his position, respecting the running of the Statute of Limitations, by these obligations here being held to be "general" obligations, it will be observed that defendant in error has, by espousing the theory that they are substantially the same as non-negotiable warrants, carrying with them the proviso that they are not payable in law or fact *unless money* is in the fund (brief, pgs. 14, 16, 39), brought himself squarely within the principle, under which relief is denied a plaintiff on the grounds that he has failed to prove a cause of action.

If counsel really believes these bonds and coupons to be non-negotiable, in spite of the mandate of the Wright act, providing that *they shall be negotiable in form* (opening brief, p. 49), and in spite of Section 3095 of the Civil Code of this state, specifying that "bonds" are *negotiable* instruments, and in spite of the case of Stowell vs. Irrigation District, 155 Cal. 223, holding that the bonds are negotiable in form, why did he repeatedly aver in his complaint that the plaintiff "did in good faith, and in the ordinary course of business, and for value before the apparent maturity of the said bond and coupons, and without knowledge of their actual dishonor or any defense thereto, if any such existed, purchase said bond"? (Transcript, pgs. 24-28.) Why also did he go out of his way in an endeavor to prove such allegations? (Transcript, p. 53.)

It still remains true that if these bonds are non-negotiable, as defendant in error claims, then practically *every other municipal bond in the country* is also non-

negotiable, and he is then also confronted with the difficulty of solving the problem of how in such event the bonds constitute binding obligations of a district, where power under the mandatory provisions of the Wright act is limited to issuing bonds "negotiable in form". (See opening brief, pgs. 44 to 47.) How can these bonds be "negotiable in form" if the fantastic claim be correct that:

"The bond itself contains a recital to the effect that it is payable out of the fund which is to be provided in a particular way for that purpose. It amounts in effect, if not in terms, to a promise on the part of the district to pay the principal and interest of the bond at the dates therein mentioned, *provided the fund out of which the payment is to be made shall have been collected.*" (Defendant in error's brief, p. 39.)

Upon this subject of bonds payable solely from a special fund, Judge Dillon, in Section 893 of his treatise on Municipal Corporations (Fifth Edition), says:

"Respecting the question of the negotiability of these instruments, it has been held that because the bonds are not payable unconditionally and at all events, but only out of a special fund created and pledged to the payment, which may or may not prove adequate to meet the obligation in full, they do not have that certainty of payment which is essential to negotiability and that *they are not negotiable* instruments within the law merchant.

Counsel would have us believe that the bonds involved here belong to the class referred to in the last quotation, and argues that the Legislature, in designating that the

bonds should be negotiable in form, did not intend that they should be negotiable in fact. (Brief, p. 15.) If this be true, it places our Legislature in the invidious position of deliberately enacting a law which has for its special object the circulation of public securities in the open market, which securities purport to be what they are not.

We hardly think such a palpable "sticking in the bark" and strange process of reasoning will commend itself to this court, when it is clear that the tangle of fallacies, contained in the brief of defendant in error, regarding the non-negotiability of this paper by reason of its being payable from a suppositious "particular fund", are unraveled and dissipated if it is only borne in mind that:

"Taxes are the primary source of municipal revenue, and money accumulated entirely from taxes with which to meet a general obligation to pay *cannot be said to be a particular fund*, in the sense of the decision, nor can it be said that taxation, the chief method of raising municipal revenue, is *a special or particular method*."

Schoenhofst vs. Kearney Co., 92 Pac. 1097.

Each struggle of defendant in error to emerge from the quicksand in which he has buried himself, through embracing such untenable doctrines, only results in revealing fresh inconsistencies.

In one breath, he informs us that "there is nothing upon the face of the bonds here indicating *what fund they are payable from*". (Brief, p. 15.)

In the next, he says that "the bond itself contains a

recital to the effect that it is payable *out of the fund*, which is to be provided in a particular way for that purpose". (Brief, p. 39.)

At one time, he asserts that the bonds are not in reality payable, "in law or in fact *upon the dates indicated upon their face*, except or provided that there is money in the specific fund" (Brief, p. 16), while he subsequently insists that "the district, by the due execution of its bond, has *expressly agreed to make certain payments at certain dates*". (Brief, p. 39.) Again, he says that these bonds are different from ordinary municipal bonds in that they are only payable from a special fund, but he signally fails to show how this fund is any more "special" than any other "bond fund" of a municipal corporation derived from general taxation (Brief, p. 14.) A strenuous effort is also made to bring these bonds into the same category as the warrants mentioned in *Shoenhoeft vs. Kearney Co.*, 92 Pac. 1097, and lengthy quotations are made from that decision—which decision we rely upon as supporting our contentions, see opening brief, page 53 and 84 to 89—with the apparent hope that by a draft on anticipated credulity, a decision may result here holding that these bonds, like warrants, "are merely drafts on anticipated revenue" (Brief, p. 16.), notwithstanding these bonds are destitute of any earmark of a "draft" or order to pay.

We challenge our opponent to point out a single existing feature of these bonds which renders them any more like warrants than are ordinary municipal bonds, and his labored argument on this subject savors and



reminds one of that primitive sort of logic which, according to travelers, enables the Samoyed to see a striking likeness between a cow and a comet in that they both have tails.

We respectfully submit that to follow the theories our antagonist contends for would not only constitute “a precedent without a precedent”, but would also inevitably result in the most wide-spread disturbance of well settled legal principles respecting municipal bonds in general.

Conspicuous among those principles is the firmly rooted tenet that it is not permissible to convert a flat promise to pay, contained in a bond, into a promise to pay *out of a particular fund*, and that where it is provided that a bond is payable from assessments, but it is neither expressly nor by necessary implication provided that the bond may not be paid in some other mode, the holder may resort to the general liability of the maker arising from the promise to pay. No attempt is made by defendant in error to answer the array of authorities referred to in our opening brief, on pages 52 to 66, showing conclusively that these bonds are “general” obligations, unless the partial quotation from Dillon on Municipal Corporations, appearing on page 18 of the brief of our opponent, can be considered an answer.

The quotation, however, was not fully given, as it was broken off in the middle of a sentence. When the whole sentence is quoted, Judge Dillon’s views harmonize with the authorities we cited, and in reading the same it will be noted that he announces the rule to be that a bond

which contains a direct promise to pay, and is not declared to be payable *only* from the fund (which is true here) is a *general* obligation “*although the bond also recites that it is issued to provide for the payment of the cost of an improvement which cost is chargeable against the property benefited and is made a lien thereon*”. He says:

“But if the enabling act does not *in express terms* limit the power of the municipality to an issue of bonds which are payable *only* from the special assessment or other designated fund, or if the municipality, besides having power to issue bonds under a statute so limiting its liability, has also power to issue its general obligations, a bond which by its terms is the direct and absolute promise of the municipality to pay a definite sum of money with interest and is not declared to be payable only from the fund, is the *general obligation* of the city, payable from its general funds or general power of taxation, although the bond also recites that it is issued to provide for the payment of the cost of an improvement, which cost is chargeable against the property benefited and is made a lien thereon.”

It is true that the bonds here recite that they are “to be paid by revenue derived from an annual tax upon the real property of the district” (opening brief, p. 48), but, as everybody knows, this is true with respect to ordinary municipal bonds and it is preposterous to contend that this recital converts the obligation into a special one, payable exclusively from a particular fund.

In the same section 893, from which the abbreviated quotation is taken, appearing upon page 18 of our op-

ponent's brief, Judge Dillon, in referring to the recital mentioned in the quotation, we have already given, further says:

"In effect, this is only a recital of the power possessed by the city for levying and enforcing a special assessment, as a means towards providing funds for the payment of the debt created by the issue and sale of the bonds; and *if there is no declaration in the bonds to the effect that they are payable only out of the particular fund, the general liability of the city is not limited thereby.*"

This is precisely what is held by the authorities which we cited in our opening brief (pages 52 to 66). Referring to securities, such as local improvement bonds, Mr. Abbott in Section 364 of his work on Public Securities, says:

"The promise to pay *is the primary contract*, the obligation on the part of the public corporation to raise a special fund or levy special taxes is a separate and independent one, the failure to perform which *does not or cannot affect the right of the holder to enforce the security according to its terms and against the maker.*" (Citing numerous authorities.)

It cannot be gainsaid that under these oft-enunciated principles, the bonds here are obviously of the same class as ordinary municipal bonds, to-wit: *general* obligations of the maker. Being *general* obligations, the particular fund doctrine vanishes and with its disappearance the notion, that the statute does not run under such doctrine, is also obliterated, because, as we have seen, no obstacle

lies in the path of the holder of a *general* obligation to prevent or excuse his suing upon its maturity, and obtaining judgment thereon. (Opening brief, pgs. 84 to 90; 93 to 99.)

### **Operation of Statute Not Suspended**

Defendant in error further argues that if the operation of the Statute of Limitations can be suspended by express agreement to that effect, it necessarily follows that it can be suspended by implication and by conduct and that the conduct of plaintiff in error was sufficient to cause such suspension. (Brief, p. 9.)

Whatever may be the rule on this subject in other jurisdictions, we submit that such an hypothesis is untenable in this state, where Section 360 of the Code of Civil Procedure provides that:

“No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby.”

In the face of this statute, it is indisputable that the claims of our opponent on this subject are clearly untenable.

In the case of *Rounthwaite vs. Rounthwaite*, 68 Pac. 304, the California Supreme Court, in referring to a similar contention, says:

“Appellant urges an estoppel by conduct against defendant. We fail to discover any elements of estoppel in the case; and, besides, an estoppel in pais



cannot be urged as against the plain requirements of the statute that the promise must be evidenced by writing to remove the bar. Such proof thus becomes exclusive.”

We again reiterate that as the bonds here are general liabilities, similar to ordinary municipal bonds, the effect of upholding such a doctrine as is advanced by the defendant in error, would be of the most far reaching character, and would open the door to all sorts of situations whereby the plain requirements of this section of the code would be rendered nugatory:

In *Shapley vs. Abbott*, 42 N. Y. 443, the court says:

“The policy of the statute, requiring that every promise or acknowledgment, to take a case out of the statute, shall be in writing, signed by the party to be charged, is to prevent fraud and perjuries. And it is the duty of the courts so to administer the law as to uphold this policy. If a parol promise not to plead the statute is to be held operative, either as a waiver, or an agreement, *or by way of estoppel*, to subvert the statute, then all the mischief, as this case shows, will be let in which it was the policy of the law to shut out.”

Irrespective of Section 360 of the Code of Civil Procedure, and should we consider that no such section exists, it is even then patent that not the slightest ground for the claim of any estoppel exists here and no act on the part of plaintiff in error, has been shown which can be tortured into any estoppel. (See *Shapley vs. Abbott*, *supra*.)

### **Lincoln County vs. Luning**

Defendant in error in his brief (p. 10) compares the case at bar to the Luning case. In our opening brief, we pointed out some of the prominent features of the Luning case, which distinguish it from the case at bar (opening brief, pgs. 78 to 104), and we fail to find anything in the brief of defendant in error which answers any of the seven points of distinction, existing between the two cases, and which are set forth in our former brief on pages 101 to 104. In fact, our adversary admits that originally the bonds in the Luning case were *general* obligations (brief, pgs. 11 and 13), and that but for the subsequent act of 1877, there would have been no question in that case that the statute ran against those bonds. As we have no such subsequent legislation here and as the payment of these bonds, for reasons already shown, is not confined to any particular fund, as they are not payable *solely and exclusively from any fund*, we respectfully submit, that no resemblance between the two cases exists.

The assertion that these bonds are akin to the Luning case bonds, based upon the theory that the act of 1877, providing for registration, etc., in that case, makes them similar (brief, p. 13), we deem "so original as to be almost aboriginal".

### **Freehill vs. Chamberlain**

The case of Freehill vs. Chamberlain, 65 Cal. 603, seems to be the authority upon which defendant in error principally relies.

In our opening brief we cited different authorities and reasons showing why that case was inapplicable here (pages 87, 90, 96, 97, 98, 101, 102, 118, 119.) Respecting that case, our antagonist argues that what the California Supreme Court said about it in Barnes vs. Glide, 117 Cal. 9, was merely dicta (brief, p. 25) and that the supervisors could have been compelled to levy the tax and thus raise fund with which to pay the bonds in the Freehill case. But what our opponent entirely ignores is the stubborn fact that in the Freehill case the bond holders were prohibited from suing the maker of the bonds, to-wit, the city of Sacramento, and that was obviously the principal ground for the decision that the statute did not run. In the Barnes case (117 Cal. 9), the court expressly says that the bondholders in the Freehill case "*were prohibited from suing the city*"; that they "*were to rely exclusively upon a certain special fund*"; that the only remedy which they had was mandamus against the treasurer "*to compel him to pay the interest on the bonds when there was money in the fund to which they could alone look under their special contract*".

When defendant in error can overturn the multitude of authorities, in line with those cited in our opening brief (pages 56 to 66), to the effect that an express, unconditional promise to pay will not be distorted into a *special* obligation or be limited or confined to any fund or shorn of the primary and general liability that accompanies such promise; when he can show the slightest authority—as distinguished from mere assertion or as-

sumption—for the theory that it is necessary in the case at bar to inject a condition into the language of these bonds, coercing their holders to “look alone” to any fund for payment; and when he can, in the face of the unnumbered suits sustained against irrigation districts, successfully interpret Section 14 of the Wright act (Statutes 1887, p. 35), providing that such districts may be sued, to mean that they are not subject to suit, it will then, we submit, be time to compare this case to the Freehill case.

It will also be noted that the bogey of possible concert of action of the district officers in omitting to perform their duty (brief, p. 31) does not exist here as, in the event of such neglect, a distinterested body can be applied to for levying taxes. (See opening brief, p. 77.)

In *Kendall vs. Porter*, 120 Cal. 106, although the question here, regarding the Statute of Limitations, was not involved in the case, the dissenting opinion of Mr. Justice McFarland refers to the nature of the contract contained in the bonds involved in the Freehill case, and he illuminates some of the points under discussion here and says:

“The rights which the appellant has against the city *are not those of a general creditor*. He could not recover a judgment against the city, upon his bonds, for a single dollar; for the bonds were issued and accepted by the bondholders under a statute which provides that the city “*shall not be sued in any action whatever.*” . . . . “I think that in the case at bar the majority opinion treats this proceeding as an action against the city by a *general*



creditor to recover a judgment for interest on overdue bonds; but, in that view, appellant could not recover either the principal or interest of his bonds, *for both would be barred by the Statute of Limitations.*"

In the dissenting opinion of Chief Justice Beatty, concurred in by Mr. Justice Van Fleet, in the same case, it is said:

"If there had been no other special provisions as to the time and mode of payment of the bonds and coupons, they would have carried with them the usual obligations and incidents of such securities. But there were very special and peculiar provisions contained in the act regulating and restricting the rights of the bondholders as to the time and manner of payment. The bonds *were not a general obligation* of the city payable out of any unappropriated revenue, but were to be paid *only* as provided in the act; that is to say, out of the special sinking and interest thereby created." . . .

"Such being the provisions of the statute, and the bonds having been issued in strict conformity thereto, it is apparent—as has been many times decided by this and other courts—that the rights of the bondholders *are not the same as those of holders of ordinary coupon bonds*. Their rights are, on the contrary, strictly measured by the terms of this statute, and they can claim nothing under general provisions of law inconsistent with it. They are to be paid certainly, but they are to be paid only in the manner and in the order as in this act provided. It contains the terms offered to the creditors of the city. They accepted those terms and thereby contracted to be bound by them.

“As remarked by Judge Sawyer in *Kennedy vs. Sacramento*, 10 Saw. 32: ‘The parties who surrendered their prior evidence of indebtedness and took these bonds took them under the provisions of this act, which was a contract made between the city and them that the bonds should be collected *only in that particular mode, and no other*; that there should be no other remedy for them—that *the city should not be sued*. The advantages which they obtained are subject to the provisions made for their payment, to the limitation put upon their remedy. The advantage to the city was that it *should not be harassed by any other kind of suit*, an extension of time for payment, and the reduction of the rate of interest. The advantage to the holders was the specific, certain and permanent provision made for prompt payment in the future.’ . . .

“In *Freehill vs. Chamberlain*, *supra*, which was mandamus to compel the treasurer to pay coupons more than four years past due, the Statute of Limitations was interposed as a defense, but it was held that, since *the city could not be sued* upon the coupons, the statute did not begin to run until the money applicable to the payment of the coupons was in the sinking fund, *the implicit concession being that the coupons would have been barred if there had been any general obligation resting upon the city to pay.*”

The foregoing opinions of Judges Beatty, McFarland and Van Fleet show the peculiar and almost unique character of the Sacramento bonds involved in the Freehill case and show plainly that, as the bondholder *was precluded from suing the city*, they did not constitute general obligations. It is true that these opinions were

dissenting opinions, but the prevailing opinion contains nothing which militates against the views we have advanced respecting the Statute of Limitations, as the prevailing opinion deals with a different subject. Moreover, the remarks of Judge Sawyer, in *Kennedy vs. Sacramento*, 10 Saw. 32, quoted by Judge Beatty in his opinion, bear out our contention when he dwells on the fact that *the immunity of the city from suit* precluded all other remedies except the one specified.

The impossibility of suing the maker of those bonds is adverted to in the *Freehill* case, and also in all decisions where the *Freehill* case is discussed, and it was upon that point which the *Freehill* case turned. Defendant in error apparently ignores this striking dissimilarity between that case and the one at bar. He further insists that the California court was wrong where, in referring to the *Freehill* case, in *Barnes vs. Glide*, it said that “the *only* remedy which the bondholder had was mandamus against the city treasurer”. It is also claimed *Freehill* could have compelled a levy of the tax and hence mandamus against the treasurer was not the only remedy. (Brief, p. 24.)

Should we assume that the defendant in error is correct in thus overruling the California Supreme Court, it does not appear how he is in any better situation. He is still confronted with the proposition that *Freehill could not sue the city*, and hence the statute did not run. The importance of this feature is ignored by our opponent notwithstanding that he italicizes, on page 45 of his brief, a quotation from *Barnes vs. Turner*, wherein it

is said that “if the Statute of Limitations *could not be urged as against the collection of the debt, evidenced by the warrants*, then it should not be urged as against the necessary preliminary steps towards the collection thereof”, and the court there further held that “an action in mandamus is simply a preliminary step towards the enforcing of the payment of these warrants”. It is very clear from this language that the implication arises that, if the debt were barred, then any proceeding in mandamus to raise funds to pay such debt would also be barred.

The fallacy indulged in by our adversary respecting the Freehill case, when he argues that, if we are correct in our reasoning, the statute had run in that case (by reason of his claim that the officials of the city could have been compelled by mandamus to replenish the fund from which those bonds were payable) becomes apparent when measured by the rule announced in *Barnes vs. Turner*, for the latter case distinctly holds that *if the main obligation is not barred by the statute*, then the step of mandamus to the officials of the municipality is *not* barred. Now, as has already been pointed out, the court held the Freehill bonds were not barred, hence it would follow that, under the rule announced in *Barnes vs. Turner*, the so-called “preliminary step” of mandamus was also not barred in that case. (See also discussion regarding mandamus in *Berkey vs. Commissioners*, 110 Pac. 201.)

The existence of a “statutory prohibition”, preventing



the commencement of an action against the city in the Freehill case, also furnishes a reason for that decision. (Sec. 356, C. C. P.; opening brief, p. 98.)

Counsel tells us ‘that *the contention is made here* that if the creditor can compel the creation of the fund by mandamus to the proper officers to levy the necessary tax, then the particular fund rule does not apply’ (brief, p. 24), and lengthy quotations are made from the brief of respondents in the Freehill case which are supplemented by the statement that “the very contentions made here by plaintiff in error were made by respondent and passed upon by the Supreme Court in the case of Freehill vs. Chamberlain”. (Brief, p. 28.) In reply to such statements it will suffice to say that not only have we no recollection of making such contentions on this appeal, but there is an utter failure on his part to point out where such theories were set forth in our opening brief, so it is not worth while to ascertain whether or no the theories mentioned, are applicable here. However that may be, the bedrock fact remains that the Freehill bonds were not *general* obligations upon which a general, personal money judgment could be recovered against the maker, who was expressly exempted from the liability of a suit on such bonds, and therefore it is futile to insist that such obligations bear any resemblance whatever to these bonds, where the irrigation district has at all times been subject to suit; where at any time after its default, a personal, general money judgment could have been recovered against it on the bonds, and where, neither

expressly or impliedly, is the payment of these bonds made conditional upon the existence of, or confined to, any fund whatever.

This being the situation, argument is superfluous to show that this is not a case, similar to the Freehill class of cases, where the maker of a *special* obligation, has prevented or neglected the raising of funds to meet such *special* obligation and by reason of exemption from suit is enabled to *require the creditor to look solely to the missing fund and not to the maker*. (See opening brief, pages 115, 96, 97, 98.)

### **Barnes vs. Glide**

We quoted from and commented upon the case of Barnes vs. Glide, 117 Cal. 1, on pages 90 to 98 of our opening brief. Our adversary attempts to parry the force of the Barnes decision by claiming that it was not a "particular fund" case, and quotations are made from the argument of the respondents in that case, with the apparent object of supporting this theory.

When it is remembered that in the Barnes case (a) a registered warrant was before the court, directing the treasurer to pay "from the Swamp Land Fund" and that, therefore, there existed infinitely stronger grounds for calling it a *special*, instead of a *general*, obligation (opening brief, pgs. 40 to 45); (b) that the sources of payment of such warrant under the laws then in force were, as here, assessments upon property within the Reclamation District (Statutes 1868, p. 516); (c) that no more pledging of funds or assessments with which to

pay these bonds has occurred here than occurred with respect to the Barnes' warrant and that, warrants have always been apparently deemed more subject to the particular fund doctrine than negotiable bonds (opening brief, p. 83); yet, in spite of these features, the California Court upheld the Statute of Limitations against such warrants, it is perfectly plain, we respectfully submit, that the statute has run here.

If the Barnes case, involving a warrant expressly and specifically payable *from a designated fund*, is not a "particular fund" case, as counsel asserts, it certainly will not do to say that this case at bar is a "particular fund" case, when it involves bonds, containing flat promises—not mere directions—to pay at specific dates, which bonds are entirely destitute of any limitation upon the source of their payment and are strictly negotiable in form.

The Barnes case was not decided upon any occult or cryptic reasons or upon any hair-splitting sophistries regarding the method of bookkeeping, or of separating any funds on the district records; on the contrary, it was decided upon the clearest possible ground, to-wit: it was a "*proceeding which might have been commenced fifteen years before it was instituted*", and for this reason, the California Court expressly differentiates the Barnes case from the Freehill case. (See last sentence of opinion, 117 Cal., p. 9.)

So we ask here, could suits have been brought on these coupons which matured in this case, more than four years before the present action was instituted? Even

our opponent will not have the hardihood to give a negative reply to this question, notwithstanding such reply goes to the very heart of the whole matter, and hence, under our code, which admits of no exceptions, it is evident the statute has run against such coupons. (Sec. 312 C. C. P.)

It was upon similar grounds the case of San Francisco Savings Union vs. Reclamation District, 144 Cal. 648, was decided.

### **Berkeley vs. Board of Commissioners**

Defendant in error also relies on Berkey vs. Commissioners, 110 Pac. 197. (Brief, p. 37.)

An examination of that case discloses that what was there said about the Statute of Limitations was dictum, as the court found that the action was commenced about three and one-half years after the maturity of the bonds there under discussion and hence was not barred by the six-year statute of Colorado, which was the statute held applicable to such obligations, but in any event the opinion of the court fortifies, rather than weakens, our conclusions here. Those bonds were apparently not *general* liabilities, as the Colorado court says:

“The method therein provided for payment is exclusive. *No action for a money judgment on the bonds would lie.*”

This shows that those bonds were somewhat similar to the bonds in the Freehill case and could not be held to be *general* obligations, carrying with them personal credit, and our remarks respecting the Freehill case apply to the case in question.



### **Barnes vs. Turner**

The case of Barnes vs. Turner, 78 Pac. 108, is another case upon which defendant in error relies (brief, p. 40). That case was decided by the Oklahoma Supreme Court and involved warrants—not bonds. We have heretofore pointed out the conspicuous distinction between a warrant and a bond issued by a municipal corporation. (See also Schoenhoeft vs. Kearny County (Kas.), 92 Pac. 1097, and opening brief, pages 83 to 90.)

The warrants in this Barnes case, as is almost invariably the case with warrants, expressly on their face, designated the fund from which they were payable, and hence carried with them the resultant consequences attending such form of obligations (opening brief, pages 40 to 45). The court held that the statute had not run against the warrants, as no fund had been provided with which to pay them, and allowed writ of mandate to compel levy of tax. Here again, the warrants were not *general* obligations. It further appears Turner had previously brought suit on the same warrants and the Oklahoma court, in Turner vs. Guthrie, 73 Pac. 283, had held mandamus to compel assessments was the sole remedy and that such warrants could not be sued upon and a money judgment obtained, and cited with approval the case of Wilson vs. Aberdeen (Wash.), 52 Pac. 524, in which latter case it was held warrants for street improvements could not be collected against the city *generally*, even though the remedy to compel assessments

was lost, either through exhaustion of the property or by being *barred by lapse of time*, the Washington Court saying:

"It is not clear whether the remedy was lost in consequence of the exhaustion of the property covered by the special liens which was of any value, or *whether it was barred by lapse of time*; but it would not make any difference. . . . The obligation rested upon the warrant holders to compel the officers of the city to proceed with the collection of the assessments, and if they saw fit to allow their remedy to become lost through a failure to compel an enforcement of the assessment proceedings, they, and not the general taxpayers, must bear the consequences."

These last quotations contain a plain intimation that the statute will run against mandamus, even though an action cannot be maintained upon the obligation and a general money judgment secured against the maker and even though such obligation is not a general one, which harmonizes with what the California Court said in *Meyer vs. San Francisco*, 150 Cal. 131, in which latter case, the court held the statute would run against obligations not capable of supporting a general money judgment.

Again adverting to the case of *Barnes vs. Turner*, it will be observed that the precedents cited by the Oklahoma Court are nearly all the same cases, discussed in our opening brief, where we endeavored to point out why they are inapplicable to the case at bar. The case

of Robertson vs. Blaine County is mentioned, upon which case we comment on page 122 of our opening brief. The Kansas cases of Hubbell vs. South Hutchinson and School District vs. Bank are also cited in Barnes vs. Turner, but in the subsequent Kansas case of Schoenhoeft vs. Kearney County, 92 Pac. 1097 (see opening brief, p. 86), the court, in referring to these cases, expressly says:

“The court had in mind nothing but the specific class of instruments it was then considering, viz., municipal *warrants*. It was not the purpose to settle (or more accurately stated, to overturn) the law relating to the limitation of actions upon ordinary municipal bonds.”

Bearing in mind that, as we have seen, the Oklahoma Court held that mandamus was the *sole* remedy of which a holder of the warrants then in question could avail himself, it becomes absurd to liken this case to the case of Barnes vs. Turner, and when the opinion in the latter case is analyzed, it will be seen that it contains the qualification that “*if the Statute of Limitations could not be urged as against the collection of the debt evidenced by the warrants, then, it should not be urged as against the necessary preliminary steps (mandamus) towards the collection thereof*”. (78 Pac. 110.) Now in the case at bar, the statute *can be urged against the collection of the debt*, as the bonds here are not special obligations which, like the Oklahoma warrant, would not support a general money judgment against the maker,

with respect to which warrant, in *Turner vs. City of Guthrie*, 73 Pac. 283, the court said:

*"The city of Guthrie never contracted to pay it in any way."*

When the California Supreme Court has spoken so plainly on this subject of the Statute of Limitations and when the Federal Courts "recognize the Statute of Limitations of the several states, and give them the same construction and effect which are given by the local tribunals" (*Amy vs. Dubuque*, 25 L. Ed. (U. S.) 228, and other cases cited in opening brief, pages 15 to 21), it is difficult to see what is gained by traveling as far as Oklahoma to ascertain what is there considered the correct doctrine, respecting the running of the statute against a warrant, and whether the Oklahoma doctrine should apply in this state. That question is a mere hypothesis, but what is not an hypothesis, but a demonstrated fact, is that the California Supreme Court has squarely held, in *Barnes vs. Glide*, 117 Cal. 1, that the statute will run even against a warrant, placing its decision on the broad ground that the proceedings "might have been commenced fifteen years before it was instituted", and that the statute "is intended to embrace *all* causes of action not specially excepted from its operation, and there is no exception applicable to the present proceeding", and fortifying that decision with such cases as *Savings Union vs. Reclamation District*, 144 Cal. 648, *Meyer vs. San Francisco*, 150 Cal. 131, and *Cal. Safe Co. vs. Sierra Rwy. Co.*, 158 Cal. 691. (See also opening brief, pgs. 27 to 36.)



### **Other Cases Cited by Defendant in Error**

The case of *Waite vs. Santa Cruz*, 89 Fed. 619, is also referred to by our opponent (brief, p. 21). This decision simply buttresses what we have said, respecting the statute, and like *Nevada National Bank vs. Supervisors*, 5 Cal. App. 638, and *Meyer vs. San Francisco*, 150 Cal. 131, shows that the defendant in error's right to sue on these coupons, ever since their maturity, has been absolutely untrammelled, hence, in the face of Section 312 of our Code of Civil Procedure and the authorities holding no exception to the statute can be made by the courts, it is unavailing to argue the statute does not commence to run with the accrual of the cause of action.

The case of *Hewel vs. Hogin*, 3 Cal. App. 248, is also cited by our opponent (brief, p. 39). This case, as well as the case of *Sawyer vs. Colgan*, are commented on in our opening brief (pgs. 128, 117).

The sentiment expressed by the court in *Tulare Irrigation District vs. Shepard*, to the effect that "common honesty" demands that a debt should be paid, is also invoked by defendant in error. Such expressions, of course, have nothing to do with the Statute of Limitations. In any event, "common decency" demands that a plaintiff should be entitled to no indulgence, who for many years has remained supine, under the circumstances existing here. (See *Eddy vs. San Francisco*, 162 Fed. 441, 148 Fed. 277; *Savings Union vs. Reclamation District*, 144 Cal. 649; and our opening brief, pgs. 68 to 75).

## **The Legislature Did Not Contemplate These Bonds Should Be Immune from the Operation of the Statute**

That the California Legislature did not contemplate that these bonds should be exempt from the effect of the statute appears from an amendment to the act providing for the dissolution of irrigation districts, which amendment is contained in California Statutes, in year 1909, at page 139, and is as follows:

“Section 10½. In the petition mentioned in section 2 of this act, it shall not be necessary to include in the schedule of indebtedness any bond, coupon, warrant or other indebtedness, claim or demand which *shall have been barred* by the laws of this state prior to the filing of said petition with the board of directors of said irrigation district, nor shall it be necessary in winding up the affairs of any district organized under the laws of this state to pay all or any portion of a debt or obligation of such district, for the enforcement of which debt or obligation, a suit is *barred by the laws of this state.*”

The bonds further recite upon their face, that “the said bonds are by said act of the legislature, made a *lien upon all said real property*”. (Trans., p. 22.)

Whoever heard of bonds constituting a lien upon *all* of the real property of a public corporation being held *special* obligations payable only from a particular fund?

### **Confusion of Right and Remedy**

In our opening brief, we invited the attention of the court to the palpable confusion of right and remedy

which apparently is the basis and cause of the judgment appealed from. (Pages 111 to 117, and 132 to 137.) We pointed out that the learned trial court held that the statute did not run for the reason that in the Federal Courts "mandamus is not available in the first instance, but only after the plaintiff's claim has been reduced to judgment". (Opening brief, p. 113.) We also attempted to show the fallacy of any reasoning which relies upon the unavailability of the writ of mandamus to a plaintiff, before obtaining judgment, as a ground for holding that a cause of action cannot accrue and consequently, the statute cannot run. (Opening brief, p. 133.) Notwithstanding such an obvious proposition, our opponent clings tenaciously to the question of "remedy"—or perhaps it would be more accurate to say the "relief"—as affecting the right to sue and the accrual of his cause of action. In floundering in the whirlpool of perplexities to which he has consigned himself by entertaining these illogical notions, he endeavors to extricate himself by such irrelevant remarks as: "Does the right to sue the Rialto Irrigation District and obtain a judgment on these bonds afford a remedy which brings the holders of the bonds any nearer to the recovery of their money than were the holders of the bonds in any other particular fund cases, who, counsel say, did not have such right to sue"? (Brief, p. 19.) Such a question merely demonstrates that the defendant in error imports a foreign element into the controversy. The answer to such a query would be as lacking in pertinency to the subject under discussion as were the celebrated

remarks, concerning "milestones on the Dover road", interjected into a serious conversation by the old lady in "Bleak House".

It is reasoning in a grotesquely absurd vein to argue that, while it is undeniable the right to sue an individual or a corporation is not affected by such prospective defendant being "execution-proof"; while it is also true that the property of any municipal corporation cannot be subjected to an execution levy; while it is also not to be gainsaid that the question of what step a plaintiff is going to take to satisfy his judgment has absolutely no bearing on his right to obtain such judgment; while it is axiomatic that the "right to sue" is equivalent to the "accrual of a cause of action", which right and accrual are things entirely distinct and apart from the consideration as to what means will ultimately be employed to enforce obedience to or obtain payment of the decree or judgment finally rendered in a legal proceeding, yet this irrigation district is to be deemed *sui generis* and, because it is sued in the Federal Court, it must be deprived of the defense of the Statute of Limitations, on the theory that it has no property subject to execution, although such condition is generally common to all public corporations.

We again ask how is it material to the inquiry, as to when a given cause of action accrues, to consider *how the judgment in the suit may be enforced?* (Opening brief, p. 137). If it is immaterial to ascertain how the judgment may be enforced, as regards the accrual of the cause of action, it is equally beside the case to determine



how the judgment will be enforced, when it comes to the question of the time when the statute commences to run.

The inability of obtaining the particular remedy or relief of mandamus before securing judgment in a Federal Court, has never yet, for a single moment, delayed or prevented a plaintiff from entering such a court and suing on his obligation and getting a judgment. To say therefore that the plea of the statute in a case like this, may be good in a state court and no good in a Federal Court, we respectfully submit, is a statement which is not founded on authority and is lacking in logic. It might as well be urged that although our code prescribes that a promissory note will be barred in a period of four years from its maturity, a different rule should be applied when such note is secured by a mortgage, upon the theory that in order to enforce the rights of the holder in the latter case, he is compelled to seek equitable relief and obtain an order of sale, while in the former case he simply avails himself of the relief afforded by a personal money judgment. It would be indeed an innovation in the law of limitations of actions if, instead of looking to the time of the accrual of the cause of action to determine when the statute is set in motion, we should be compelled to ascertain what step we should ultimately have to take in order to consummate the relief sought and enforce the judgment obtained in the action. If such were the law, no lawyer on earth could, at the time of the commencement of an action, advise his client in many instances, whether or no a claim were outlawed. So we say here, how can any plaintiff, in such a case as

this, tell in advance of procuring a judgment, whether he will ever have to invoke the assistance of the writ of mandamus, in order to satisfy his judgment. The expediency of following such a course would depend on numerous contingencies and the question of mandamus hence is obviously a false quantity in the solution of this controversy respecting the running of the statute. (See opening brief, p. 137, 112.)

On page 52 of his brief, defendant in error paints a glowing picture of an earthly paradise in this Rialto Irrigation District, which it seems to be intimated is the product exclusively of the water acquired by the district in exchange for its bonds. He omits to state that whatever little prosperity the district enjoys is principally resultant from the heavy investments made by its inhabitants in developing and acquiring water entirely distinct from the water so acquired, nor does he mention the fact that the flowing waters, conveyed to the district by the Semi-Tropic Land and Water Company, ceased to flow soon after the consummation of that transaction, and that ever since the pumping expense has proved an enormous burden. (Trans., p. 55.) Such a picture as is given by an opponent becomes, when the actual conditions are examined, a mirage as lacking in reality as the preposterous values placed on the water by defendant in error.

In his concluding remarks on the subject of the Statute of Limitations, defendant in error insists that he has not been sleeping on his rights. (Brief, p. 54.)

We challenge this statement. Although it is true he

commenced an action in San Bernardino county, in 1900, yet it is also true that the plaintiff never brought the suit to trial until the year 1906, and judgment was not entered therein until January 15th, 1907, under which judgment, Judge Bledsoe, now United States District Judge, held void all of the coupons sued on. This judgment was finally reversed in February, 1909 (155 Cal. 220), but the plaintiff never brought the action on for its second trial until the autumn of the year 1915, and the matter is still under advisement by the San Bernardino County Superior Court. In other words, more than fifteen years has elapsed since the action was filed, and it has not yet reached final judgment. The decision of Judge Bledsoe naturally furnished additional encouragement and foundation for the belief on the part of investors and settlers in the district, that these bonds, like so many other irrigation district issues, were void and under that belief, extensive improvements and developments have been made in the district.

Notwithstanding the lethargy and inaction of the defendant in error in the premises, and in spite of his neglect to sue before and press his dubious claims, he seems to think that there are equitable grounds for exempting him from the operation of the Statute of Limitations; to which notion, we reply, in the language of Lord Loughborough, "an equity arising out of one's own neglect. It is a singular head of equity". (4 Bro. C. C. 469.)

Nor does the language of the court in the *nisi prius* decision appearing on page 55 of defendant in error's brief apply here. In the first place, the corporate organ-

ization of the Rialto Irrigation District is being continued and thereby, the power to perform the duties of the district exists and, secondly, the county supervisors are always available in the event of the district failing to make proper assessments.

### **Date of Issuance of Bonds**

Passing from the topic of the Statute of Limitations to some of the other points mentioned in the brief of defendant in error, it will be noted that he argues that as the court held that the bonds in *Stowell vs. District*, 155 Cal. 215, were issued in substantial compliance with the Wright Act, the same ruling should be made here.

On pages 156 to 158 of our opening brief, we commented on the *Stowell* case and advanced reasons why some of the remarks in that case should not apply here. As we said before, the court was there considering whether the bonds were void *upon their face*, by reason of the discrepancy existing between the date of the coupons and the bond, and the court was not considering a case where bonds were sold or exchanged and delivered many years after the date they bore. Here every bond mentioned in the amended complaint was delivered from 1895 to 1897. (See Trans., pgs. 26, 56, 57.) *These bonds were not involved in the Stowell case*, and yet counsel seems to intimate that the testimony in that case showed deliveries of these bonds from 1895 to 1897. (Brief, p. 57.)

When he cites page 60 of the transcript in the case at bar, to verify this assertion, an examination of that page



will disclose that the bonds mentioned thereon, are the bonds in this suit—not the Stowell suit. (Trans., pgs. 26, 60.) The Stowell case, as regards the discussion of the date of the bonds there involved in the briefs and in the opinion, really revolved round the question whether January 1st, 1891—the date interest commenced—or November 17th, 1890—the date appearing on the bond, should be deemed the date of issuance of those bonds, and there was no finding in that case showing that *any bond was delivered after January 1st, 1891*. The stress of the argument in that case appears to have been placed on the theory that November 17th, 1890, was the real date of the bonds, and it was insisted by the respondent in that case that those bonds were issued after that date.

The Supreme Court points out (155 Cal. 222) that the trial court found “that the bonds were signed on *or about* December 21, 1890, and that none of them were disposed of or delivered prior to December 21st, 1890”. The court then holds that those bonds “are to be regarded as, in effect, issued on January 1st, 1891”.

The question as to whether such bonds could be legally delivered many years after January 1st, 1891, was not considered by the court, and why should it have been when such question does not seem to have been argued? In the petition for rehearing the respondent, on page 18, says:

“Just when these bonds were issued does not appear. . . . When they were so delivered does not appear.”

It is evident the California Supreme Court did not

consider the question presented here, especially when it is remembered that none of the bonds mentioned in the amended complaint (Trans., p. 26) were ever before the California Supreme Court. This is shown by the language of the court when it says:

“The points, made by respondent, are that the bonds did not bear date at the time of their issue, as required by the act, and that they were made payable at periods *longer* than those authorized by the statute.”

Of course, it is plain that delivering bonds, years after their date, would make them payable at periods *shorter*—not longer—than those authorized by the statute.

If there was testimony to the effect counsel claims before the Supreme Court in the Stowell suit, it was clearly irrelevant and did not concern the bonds in that suit, and evidently was not considered by the court.

It is also urged that if the word “issue”, used in the Wright Act, means emission of the bonds, the directors would be unable to “*immediately* cause bonds in said amount to be issued”, as required by Section 15 of the original Wright Act. (Brief, pgs. 61, 62.) But this section was amended before 1895 and prior to the issuance of the bonds mentioned in the amended complaint, and the word “immediately” was eliminated from the amended section. The portion of the amended section bearing on this subject is found in California Statutes for 1891, at page 148, and reads as follows:

“If a majority of the votes cast are ‘Bonds—Yes’, the Board of Directors shall cause bonds in said amount to be issued; if a majority of the votes cast

at any bond election are 'Bonds—No', the result of said election shall be so declared and entered of record, and whenever thereafter said Board in its judgment deems it for the best interests of the district that the question of issuance of bonds in said amount, or any amount, shall be submitted to said electors, it shall so declare of record in its minutes, and may thereupon submit such question to said electors in the same manner and with like effect as at such previous election. Said bonds shall be payable in gold coin of the United States, *in ten series*, as follows, to-wit: At the expiration of eleven years, five per cent *of the whole number* of said bonds; at the expiration of twelve years, six per cent; at the expiration of thirteen years, seven per cent; at the expiration of fourteen years, eight per cent; at the expiration of fifteen years, nine per cent; at the expiration of sixteen years, ten per cent; at the expiration of seventeen years, eleven per cent; at the expiration of eighteen years, thirteen per cent; at the expiration of nineteen years, fifteen per cent; at the expiration of twenty years, sixteen per cent; and shall bear interest at the rate of six per cent per annum, payable semi-annually, on the first day of January and July of each year. The principal and interest shall be payable at the place designated therein. Said bonds shall be each of the denomination of not less than one hundred dollars, nor more than five hundred dollars; shall be negotiable in form, signed by the President and Secretary, and the seal of the Board of Directors shall be affixed thereto. *Each issue shall be numbered consecutively as issued*; and the bonds of each issue shall be numbered consecutively,

and bear date at the time of their issue. Coupons for the interest shall be attached to each bond, signed by the Secretary. Said bonds shall express on their face that they were issued by authority of *this Act, stating its title and date of approval*, and shall also so state *the number of the issue of which such bonds are a part*. The Secretary shall keep a record of the bonds sold, their number, the date of sale, the price received, and the name of the purchaser. In case the money raised by sale of all bonds issued be insufficient for the completion of the plan of canal and works adopted, and additional bonds be not voted, it shall be the duty of the Board of Directors to provide for the completion of said plan by levy of assessments therefor."

By comparing this amended section with the original section, appearing on page 49 of our opening brief, it will be observed that several changes are made by this amendment of 1891, some of which are as follows:

(1). No time is fixed within which the bonds are to be issued;

(2). The bonds are to be made payable in ten different series. This is quite a different proposition from making installments of all the issued bonds mature from time to time, as provided by the Act of 1887. Under the scheme of the amendment, there were to be *no installment payments on the principal at all*, but each distinct series was to be entirely payable on the maturity date fixed by the amendment.

(3). Each issue is to be numbered consecutively as issued, and the bonds of each issue are to be numbered consecutively and bear date at the time of their issue.



This provision also constitutes an innovation upon the Act of 1887. Under the latter act, the bonds, it is true, were to be numbered consecutively as issued, but no numbering of the different issues was provided for under that act.

(4). The bonds are to express on their face that they are issued by authority of *this Act*, stating its title and date of approval, and shall also so state the *number of* the issue of which such bonds are a part.

These amendments were not called to the attention of the court in the Stowell case, nor we believe in any other case which involved bonds delivered after the amendment. When the well settled rule is that "the authority of a public agent depends on the law as it is *when he acts*." (Anthony vs. Jasper County, 25 L. Ed., U. S., 1005, and see the opinion of this Circuit Court of Appeals in Wright vs. East Riverside Irrigation District, 138 Fed. 313, which last case the Federal Supreme Court declined to review in 50 L. Ed., U. S., 623); and when the final and most important act of the whole transaction was the *delivery* of these bonds—prior to which time, of course, they were of no more value than waste paper—it is clear the officers of the district were bound by the mandatory terms of the amendment and it was incumbent upon them to make the bonds emitted by the district after the amendment conform to that amendment. Especially must this be true in the light of the stringent provisions of Section 42 of the Wright Act. (See opening brief, pgs. 45, 46, 150, 161, et seq.)

It is very obvious that so long as these bonds—although they had been executed—remained in the treasury of the district, no vested rights of any kind could be affected by an amendment made to the act, under which act, the election authorizing the bonds had been held. Possibly, it would not be necessary to hold another election, but we do submit that the amendment governed the acts of the officers in incurring an obligation by issuing the bonds after such amendment.

In referring to the operation of statutes upon incomplete transactions, Endlich, in Section 284 of his treatise on Interpretation of Statutes, says:

“Where an act declared, as a rule of construction of wills, that a general devise or bequest of the testator’s real or personal estate should operate as an execution of a power of appointment, unless a contrary intention appeared in the will, and declared the act operative as to the wills of all persons who should die after the date of its passage, this was held to extend the act, in terms, to all cases of wills *executed before*, as well as after, its passage, where the testator died since the same.”

In Section 281 of the same work, it is said:

“Mere inchoate rights, depending for their original existence upon the law itself, may be abridged or modified by the Legislature at its pleasure, and statutes will not be presumed not to affect such rights existing in an unperfected state at the time of the enactment. As a general rule, whenever a statute gives a right, in its nature not vested, but

remaining executory, if it does not become executed before a repeal of the law giving it, it falls with the law and cannot be afterwards enforced.”

Again in Section 280 of the same work, it is said:

“A statute is not retrospective, in the sense under consideration, because *a part of the requisites* for its action is drawn from a time antecedent to its passing.”

See also footnote in 36 Cyc., p. 1203, and *Aspinwall vs. Daviess County*, 16 L. Ed. (U. S.) 296; *Wadsworth vs. Supervisors*, 26 L. Ed. (U. S.) 222. So we say here, *merely because* an election was held authorizing bonds, and subsequently the statute was amended expressly changing the form of the bonds, it would be an untenable contention to assert that because of the prior election which is “a part of the requisites” for the action of the amendment, such amendment could not apply to bonds emitted after the amendment, when section 42 of the Act unequivocally declares that the officers of the district shall have no power to incur any debt “*by issuing bonds* or otherwise in excess of the express provisions of the act”. (*Wadsworth vs. Supervisors*, 26 L. Ed. (U. S.) 222; *Aspinwall vs. Commissioners*, 16 L. Ed. (U. S.) 296.)

The “express provisions” of the act were entirely ignored with respect to these bonds, and these bonds, delivered years after the amendment, utterly fail to comply with its provisions and, among other defects, it will be found that they not only fail to be payable in series, but also omit to recite that they were issued under

the amended act, or to give its title ("An Act to amend an Act entitled 'An Act to provide for', etc.") (Stats. 1891, p. 148), or to give its date of approval (March 20, 1891), or to state the number of the issue, or to number the issues consecutively as issued.

The amendment also states that the bonds are to be signed by the president and secretary and the coupons by the secretary. When it is remembered that this means by the *then* president, and the *then* secretary, it follows, we submit, that these bonds should have been signed by the persons who respectively held the office of president and secretary, and that the coupons should have been signed by the person who was secretary, at the time the bonds were emitted. (Wright vs. East Riverside Irr. Dist., 138 Fed. 313.) It has also been held that even an innocent purchaser of bonds reciting compliance with the Act under which they were issued, is not protected, if the persons signing the bonds have not the official character they purport, upon the face of the bond, to possess. (Coler vs. Cleburne, 33 L. Ed. (U. S.) 146.)

Now, while it is true that A. B. Fowler was the president and D. Robinson was the secretary of the board of directors of the district, upon the date the bonds and coupons purport to have been executed (November 17th, 1890—Trans., p. 22), and upon the date the bonds were in reality executed (on or about December 21st, 1890—brief of defendant in error, p. 57), yet on March 7th, 1893, Fowler ceased to be president and C. A. Kingman was elected president in his place and Fowler never afterwards held that office, which accounts for Kingman



executing as president the contract of June 12th, 1893 (Trans., p. 115). It also appears that Robinson was not secretary after February, 1894 (Trans., pgs. 59, 118).

From the allegations in the amended complaint, the theory of defendant in error seems to be that the "date of issue" of the bonds was January 1st, 1891 (Trans., pgs. 25, 26). Although the allegations of the "issuing" of these bonds contained in the amended complaint would seem to be purely legal conclusions, and hence the truth of the same would not be admitted by absence of denials traversing them, yet the plaintiff in error does deny: That any of the bonds were lawfully issued (Trans., p. 33); that the apparent date of the bonds, as distinguished from their true date, was November 17th, 1890 (Trans., p. 34); that any of the bonds or coupons were made payable as of the date of January 1st, 1891 (Trans., p. 35); or that January 1st, 1891, was the date or date of issue of any of the bonds. (Trans., p. 36.) Furthermore, it is specifically alleged in the answer of plaintiff in error that none of the bonds were delivered on November 17th, 1890, or on January 1st, 1891, and that none of them bear date at the time of their issue (Trans., p. 36), and that none are made payable in the time prescribed by the statute (Trans., p. 37).

We submit therefore, that the allegations in the answer are amply sufficient to constitute an issue on these points and that antedated bonds, executed in form, which did not comply with the statute in force when they were finally emitted over the signatures of persons who, at the time of such emission, had long ceased to be

officers of such district, cannot constitute binding obligations of the district. We reiterate, that although the persons executing the bonds were the officers of the district at the time of such execution, yet, in the words of the California Supreme Court, "executing is *not* issuing, for they may be fully executed, but never issued". (Sechrist vs. District, 129 Cal. 640.)

As we said before, it has been held that the word "issued", when applied to irrigation district bonds, means actual delivery (Sechrist vs. District, 129 Cal. 640; O'Neill vs. Irrigation District, 121 Pac. 283; opening brief, p. 155); and this Circuit Court of Appeals has already held, in referring to the antedating of similar bonds, in Wright vs. East Riverside Irrigation District, 138 Fed. 313, that:

"The direct and necessary effect of which is to make them payable within a shorter time than is provided by the statute for their payment, which provision is, as a matter of course, of *the essence of the law, and not a mere matter of form.*"

In the Stowell case, 155 Cal. 223, the court says:

"The power of public corporations to issue bonds is to be exercised in the manner prescribed by statute. 'There can be no doubt that it is within the power of a state to *prescribe the form* in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability'. (Anthony vs. County of Jasper, 101 U. S. 693.) Where the statute has fixed the term for which bonds shall run, bonds in which payment is undertaken at the expiration of either a shorter (People's Bank vs. School District,

3 N. Dak. 496; 57 N. W. 787) or a longer term (Norton vs. Town of Dyersburg, 127 U. S. 160; 8 Sup. Ct. 1111; Barnum vs. Okolona, 148 U. S. 393; 13 Sup. Ct. 638) than that authorized *are invalid.*"

In addition to the authorities we cited on page 149 of our former brief, to the effect that the word "issue" means final emission or delivery, there will be found a multitude of authorities on this subject.

In the recent case of Moreing vs. Shields, decided October 5th, 1915, by the California District Court of Appeals, and reported in 152 Pac., p. 964, reclamation district bonds were involved, and the court said:

"It is the contention of respondents that bonds have been issued herein for the reason that they have been executed and placed in the hands of the treasurer. We are satisfied that this is a mistaken view of the significance of the term. It cannot be said that the bonds have been issued until they have been sold and placed in the hands of third parties, so as to create an obligation against the district. The term "issue" as applied to bonds has been construed in many decisions which are collated by petitioners from which we make a few quotations. In Sechrist vs. Rialto Irrigation District, 129 Cal. 640, 62 Pac. 261, the question was whether certain irrigation district bonds were barred by the Statute of Limitations, and the court, through Commissioner Chipman, declared:

"But it cannot be maintained that the bonds were issued in the sense of the statute until they were delivered for a valuable consideration. It was said in Brownell vs. Greenwich, 114 N. Y. 578 [22 N. E. 24, 4 L. R. A. 685], speaking of certain bonds in

litigation: "They bear the date of March 25, 1871, and are presumed to have been executed at that time; but executing is not issuing, for they may be fully executed but never issued. . . . The bonds had no legal inception, and could not become valid obligations, aside from any other question, until actually delivered for a valuable consideration. Under the circumstances, we think that the delivery of the bonds to the plaintiff determines the date when his bonds were issued'".

"In *Corning vs. Board of Commissioners*, 102 Fed. 57, 42 C. C. A. 154, we find the following:

"It (referring to the word 'issued') is a common, plain word, whose usual significance is well known to persons of ordinary intelligence. In the absence of other definition in the statutes of Kansas, the presumption is strong that the Legislature used it, and intended to use it, in its accustomed sense. It was used in laws relative to the sending forth of municipal bonds; laws upon which the officers of the state, of the counties, of townships, and of school districts, and the purchasers of the bonds of these quasi municipal bodies must rely, and which they must interpret. These officers and purchasers have interpreted and acted upon these laws without notice from the Legislature that they intended that this word should have any strange, broad, and unusual meaning in these statutes. In this state of the case no definition will be found so safe, so just, or so equitable as the ordinary meaning of the word—the meaning which the word at once conveys to the ordinary apprehension—and that is to 'emit', to 'send forth.'"



“In *City of Austin vs. Valle* (Tex. Civ. App.), 71 S. W., 414, it is said that, as used in a city charter providing that when bonds were ‘issued’ a fund be provided to pay the interest and for a sinking fund, the word ‘issued’ referred to the time of the sale of the bonds, or when they passed into the hands of some one who claimed them as a debt against the city.

“A large number of other cases is cited to the same effect, but, indeed, it is plain enough from the context that the word ‘issued’ signifies the delivery into the hands of a purchaser”.

In the syllabus of the case of *Perkins County vs. Graff*, decided by the Circuit Court of Appeals, 114 Fed. 441, it is also said:

“The verb ‘issue’ means to emit or send forth, and it does not embrace the preliminary acts of signing and dating, but *is confined to the delivery of bonds.*”

In *Germania Savings Bank vs. Suspension Bridge Co.*, 26 N. Y. S. 98, it was held that:

“The term ‘issue’, as applied to negotiable paper, means its *delivery* for use and circulation.”

It is further argued that if the bonds should be dated at time of delivery, it would become necessary for the directors to levy assessments, in excess of the amount needed to meet the maturing amounts of the principal of the bonds. (Brief, p. 63.) This supposition is based apparently on the language of Section 22 of the Act of 1887, set forth on page 63 of our opponent’s brief. But this section was also amended in 1891, long before these bonds were emitted, to read as follows:

“Section 22. The Board of Directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and at the expiration of ten years after the issuing of bonds of any issue must increase said assessment to an amount sufficient to raise a sum *sufficient to pay the principal of the outstanding bonds as they mature.*” (Cal. Stat. 1891, p. 149.)

If there were ever any grounds for the theory indulged by our opponent, it is clear that they were swept away by the amendment which expressly provides that it is only necessary to raise by levy an amount “sufficient to pay the principal of the outstanding bonds as they mature”, but in any event, and irrespective of the amendment, mere inconvenience respecting assessments or financial arrangements of an irrigation district, cannot be permitted to upset the express terms of a statute.

In the Stowell case the court obviously employed the word “issue” in its usual and well accepted sense, when it says: “So long as it did not *issue* any bonds until it received as consideration therefor, the property”, etc. (155 Cal. 221.) If defendant in error’s contention be correct that the word only means “the authorization and preparation of the bonds, including the date from which they are to run” (brief, p. 64), then all these bonds were illegally issued, as they were prepared before any property was received as consideration therefor.

### **Bonds Were Issued for Unlawful Consideration**

On pages 158 to 161 of our opening brief, we dwelt upon the illegal character of the consideration for the

bonds sued on herein. The testimony shows that all of the bonds embraced in the amended complaint were delivered to Stowell under the contract of January 2nd, 1895 (Trans., pgs. 26, 57, 115), and we will not repeat what we before said on this subject.

Counsel says that this contract "was taken from the transcript in the case of Stowell vs. Rialto Irrigation District", and he further states that "this particular contract was before the Supreme Court of California in the case referred to and that court held the bonds issued by the district valid". (Brief, p. 66.) Counsel is laboring under a misapprehension in making these statements. At least, we have been unable to find this contract set forth in our copy of the transcript printed in the Stowell case. It is difficult to see why it would have entered into that controversy, for, as we have already said, the bonds sued on, in the amended complaint here, were not sued on in the Stowell case. As a matter of fact, the opinion in the Stowell case very clearly shows that those bonds were the bonds delivered under the contract made by the Semi-Tropic Land and Water Company with the district, the court distinctly saying:

"The coupons held by plaintiff were all attached to bonds which had been so received by *the Semi-Tropic Company*." (155 Cal. 219.)

The evidence in the case at bar shows that all of the bonds mentioned in the amended complaint were received by Stowell—not by the Semi-Tropic Company—and were delivered to him under his individual contract

of date January 2nd, 1895 (Trans., p. 57), which contract is not mentioned nor considered by the court in the Stowell case.

It is also argued by defendant in error (brief, p. 66), that the stipulation, made prior to the trial, to the effect that "the consideration that said district received for the bonds issued and which the bonds mentioned in this suit are a portion, was six hundred and fifty inches of water, pipelines", etc. (Trans., p. 52), precludes our now asserting that the bonds were issued for an invalid consideration. We submit that the stipulation does not have such effect. We do not deny that the district ultimately received the pipe mentioned in the contract of 1895, but the trouble with the transaction was that the consideration was not contemporaneously received by the district when it delivered the bonds. (See opening brief, p. 158). An irrigation district is not allowed to part with its bonds on credit, and yet that method was pursued here.

As counsel says (brief, p. 66), this stipulation was entered into prior to the trial of the case. After this stipulation was made, a second stipulation was made, to the effect that certain instruments and testimony received in the Stowell case and *certain other instruments*, should be deemed in evidence in the case at bar (Trans., p. 58). Of course, both stipulations have to be read together and it was under this subsequent stipulation that the contract of 1895 and the evidence regarding delivery of the bonds was admitted in this case. It would be a somewhat startling doctrine to contend that a prior stip-



ulation cannot be qualified or modified or changed by a subsequent stipulation in the same suit, when it has been held that a stipulation does not prevent the introduction of other evidence on the same subject covered by such stipulation. (*Dillon vs. Cockcroft*, 90 N. Y. 649; *Commonwealth vs. Young* (Mass.) 43 N. E., 118).

If counsel be correct in his theory regarding this matter, it would follow a contractor could legally make a contract with such a district, for making pipe, extending over a period of many years, and under the terms of such contract, obtain bonds from the district perhaps ten years before the completion of the work. In such event, it might in a sense be truthfully said (as was said in the stipulation), if the pipe were ultimately made according to the terms of such contract, that the bonds handed out in the meantime, were issued for the consideration mentioned in the contract, to-wit: the pipe. But such method of obtaining the bonds prior to the completion and delivery of the pipe, would be illegal. (Opening brief, p. 159.)

### **Decree of Confirmation**

It is further argued that "the district admits the issuance of a bond bearing on its face a date prior to the filing of its own petition for confirmation". (Brief, p. 68.) It is true the bonds were dated November 17th, 1890, but the uncontradicted evidence here shows the bonds were not in existence on that date, nor on the date when the petition for confirmation was filed (*Trans.*, p. 64, and opening brief, p. 196). The allegations in the

amended answer of the district, state the matter correctly when it is alleged that the confirmation proceeding was brought solely for the purpose of determining the regularity of certain proceedings preliminary to and providing for and authorizing an issue of bonds. (Trans., p. 36). This is quite different from attempting to obtain an adjudication upon the validity of bonds already issued. Of course, such a proceeding would not have a prophylactic effect upon the bonds or render them immune from the effect of acts performed, in issuing the bonds subsequent to the decree of confirmation, in defiance of the Wright Act.

We do not go so far as to say that a decree of confirmation is indispensable to the validity of irrigation district bonds, although counsel—owing perhaps to the somewhat ambiguous statement we made, on page 196 of our former brief in following the language of the assignment of error—seems to think that we so contend (brief, p. 67). We do insist, however, that under the authority of *Stimson vs. District*, 135 Cal. 394, the court had no jurisdiction in the premises, when it attempted to confirm bonds, exchanged or used for acquiring property under Section 12 of the Wright Act. (See opening brief, p. 197.) It is undeniable that these bonds were so used, and that they were not sold pursuant to Section 16 of the act, and hence the language of the California Court is applicable when, in the *Stimson* case and referring to the Confirmation Act, it says:

“It evidently refers to the provisions of the original act for the sale of bonds, which are to be found

in Section 16 of that act (Wright Act). It has no reference to the provisions of Section 12.”

There being no statutory authority for such a proceeding and the court having no jurisdiction of the subject matter, it is futile to argue that any estoppel can arise against the district by reason of a decree based on a petition filed on December 12th, 1890 (Trans., p. 36), at which time the bonds were non-existent and the court was without power to render a decree establishing the validity of the bonds under the existing circumstances.

In Section 68 of Herman on Estoppel and Res Judicata, it is well said:

“If a court has no jurisdiction its decision is a nullity, and it matters not what facts it finds, or what questions it decides—in fact, they are all nullities. If without jurisdiction it cannot adjudicate the real merits of the case, it cannot adjudicate any other question, whether it be introductory, incidental, or collateral.”

We have seen that our opponent argues that the bonds are non-negotiable, hence it can hardly with good grace be claimed by him that he can invoke the benefits, arising from the doctrine which protects innocent purchasers for value; but even if he were such an innocent purchaser, the original infirmity in the bonds would still inhere (opening brief, pgs. 161 to 175). Above and beyond all, every bond mentioned in the amended complaint herein, was acquired by the defendant in error directly from the district, which fact alone would, of

course, leave no room for the operation of such doctrine.

We respectfully submit that the judgment should be reversed.

F. A. LEONARD,  
HOWARD SURR,  
LEONARD AND SURR,  
*Attorneys for Rialto Irrigation District.*





No. 2491.

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United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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Rialto Irrigation District,	}
<i>Plaintiff in Error,</i>	
vi.	
N. W. Stowell,	
<i>Defendant in Error.</i>	

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PETITION OF DEFENDANT IN ERROR.

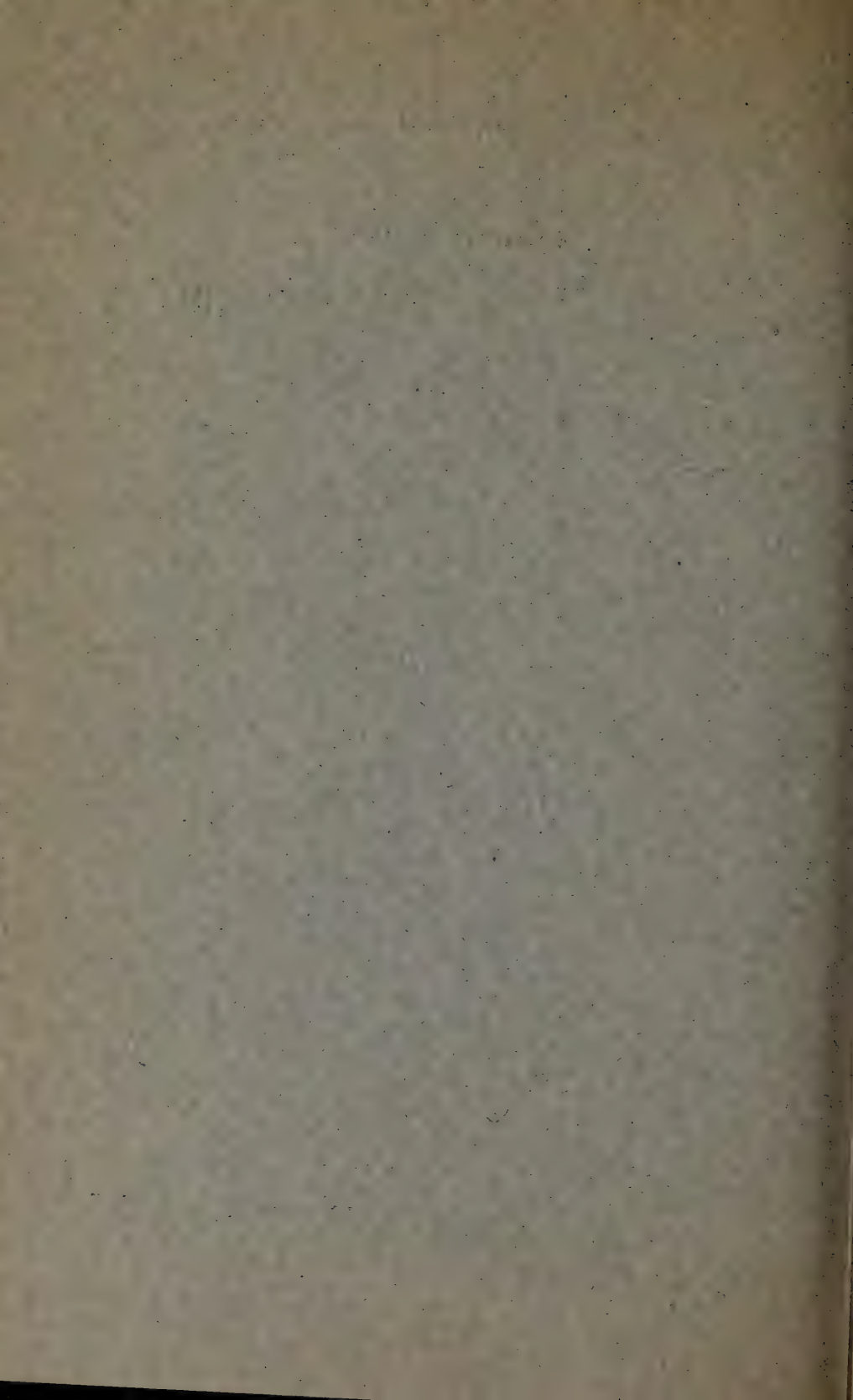
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F. D. MONTGOMERY

J. W. SWANWICK,  
*Attorney for Defendants in Error.*



United States  
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

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Rialto Irrigation District,  
*Plaintiff in Error,*

*vs.*

N. W. Stowell,  
*Defendant in Error.*

No. 2491.

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Rialto Irrigation District,  
*Plaintiff in Error,*

*vs.*

Burt Chellis,  
*Defendant in Error.*

No. 2492.

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Burt Chellis,  
*Plaintiff in Error,*

*vs.*

Rialto Irrigation District,  
*Defendant in Error.*

No. 2493.

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Petition of N. W. Stowell, Defendant in Error in Case No. 2491, and of Bert Chellis, Defendant in Error in Case No. 2492 and Plaintiff in Error in Case No. 2493 for Rehearing, and Statement of Same Parties on Motions for Modification of Orders of Reversal.

An opinion was filed by this court in cause No. 2491 on October 15th, 1917, by which the judgment is reversed and the cause remanded to the court below for



further proceedings not inconsistent with the views therein indicated; on October 16th orders were made in each of the other causes above named, Nos. 2492 and 2493, by which the judgments were reversed for further proceedings not inconsistent with the views expressed by the court in the opinion above referred to.

In each case a motion has been filed for a modification of these orders of reversal. These motions came on regularly for hearing November 5th, 1917, at which time, upon the suggestion of the court, time was given to counsel for the moving party within which to serve and file a written statement of his position in order that the same might be submitted to the justices of the court not present at the argument.

Under rule 32 of the rules of this court, the mandate is due to issue within thirty days from the date of the order of reversal, unless within said time a petition for rehearing be filed. At the hearing of the motions for modification of the orders of reversal, it was suggested by the court that perhaps the proper practice to present the points there made would be by a petition for rehearing. In order to meet this suggestion and in order that there may be no question as to the stay of the mandate, this petition for rehearing is presented. This petition is served within the time allowed within which to file the statement above referred to, it would serve no useful purpose to repeat what we desire to say in this petition. We will therefore ask the court to consider this document both as a petition for rehearing and a statement of our position on the motions for modification of the orders of reversal.

The orders of reversal in the three cases having all

been based upon the opinion rendered in No. 2491, and the points being similar, we present one form of petition and statement in each of the cases.

The motions are for orders instructing the lower court to reduce the judgments entered October 6th, 1913, in amounts as follows:

No. 2491 .....\$47,930.00

No. 2492 ..... 61,759.85

No. 2493 ..... 4,367.00

and that in all other respects said judgments be affirmed. Plaintiff in error, Rialto Irrigation District, to recover its costs.

By this petition for rehearing the defendants in error ask for the same orders.

This petition does not involve any request to this court to in any way change the conclusion stated by it in its opinion rendered in No. 2491, filed herein October 15, 1917.

The points decided by this court in its opinion, in so far as material here, may be summarized as follows:

First: The bonds issued under the contract between the Rialto Irrigation District and N. W. Stowell of January 2, 1895, are invalid. (See opinion, page 11.)

Second: The other bonds upon which the judgment of the lower court was, in part, based, constituted valid obligations of the district. (See opinion, page 12.)

Third: The defense of the statute of limitations interposed by the district is upheld.

Defendants in error, petitioners here, are therefore only entitled to recover upon the portions of the bonds which this court has held to be valid obligations of the district—and which are not barred by the statute of limitation. The various amounts in which we have asked that the several judgments be reduced represent the amounts of the void bonds and of the installment of interest and principal of the other bonds which this court holds are barred. At the oral argument of the motions the court pertinently asked why the relief sought could not accomplish in the lower court after the reversal. Our answer to that query is this: these actions are based upon coupons attached to bonds of the district, some for installments of principal and some for interest upon the principal. Neither the installment nor interest coupons bear interest after maturity; each installment coupon contains the following: "Interest on said installment will cease after maturity" [Tr. p. 44]; there is no contract to pay compound interest and therefore no interest can be recovered on the interest coupons—the judgment in each case was recovered October 6th, 1913; if the amount of the judgments be reduced as asked the balance will bear interest.

Rule 30 of the rules of this court provides for interest upon judgments of the inferior court which are affirmed under that rule, we would be entitled to 7% interest, the rate provided in California, on the portion of the judgments affirmed.

The court below could not allow interest upon a reversal such as is ordered here—the judgment is gone. There would have to be a new trial and interest could

only be recovered from the date of the new judgment. By its opinion this court in effect says that the judgment of the lower court is valid except in so far as it is based upon the void bonds and the barred bonds and coupons. We contend that these amounts can easily be determined from the record and that the judgments should be affirmed in the amounts in which they are not erroneous.

The theory of the defendant in error upon the question of the statute of limitations was based, to a large extent, upon the idea that the only judgment which could be recovered was a judgment establishing the validity and the amount of the indebtedness represented by the bonds; that it was not a judgment upon which an execution would lie, but only a judgment which might be used as the basis of another proceeding for the purpose of obtaining the money for its satisfaction. (See page 13 of opinion.)

This court, by its opinion, holds that theory erroneous. We respectfully submit that if the judgments rendered are ordinary, common law money judgments upon which an execution might issue, we are certainly entitled to the full benefit of the judgments in so far as they are valid.

The three cases were tried together in the court below. A bill of exceptions was settled in each case. This bill of exceptions in No. 2491 appears on pages 51 and following, of the printed transcript of record. The bill of exceptions in each of the other cases appears in the record of these cases on file in this court, neither of said records having been printed (the printing of same having been obviated by stipulation).



The testimony in regard to the bonds in question is identical in each bill of exceptions. This testimony appears upon pages 56 and 57 of the printed transcript in No. 2491, was given by N. W. Stowell, and is as follows:

“The following bonds were delivered to me by the Semi-Tropic Company, under my contract with it of date November 7th, 1890, upon the following dates, to-wit:

January, 1891, bonds numbered 135 to 154; 205 to 234;

January 16th, 1891, bonds numbered 235 to 250;

September 16th, 1891, bonds numbered 251 to 260;

July 3rd, 1892, bonds numbered 939 to 949.

The following bonds were delivered to the Stowell Cement Pipe Company by the Semi-Tropic Company under its contract with the pipe company, of date June 4th, 1892, upon the following dates, to-wit:

November 2nd, 1892, bonds numbered 751 to 755; 901 to 906;

March 27th, 1893, bonds numbered 626 to 662;

July 1st, 1893, bonds numbered 401 to 410;

October 10th, 1894, bonds numbered 305 to 321; 325 to 350; 421 to 425; 476 to 492;

Bonds numbered 665 to 670, 907 (56-5).

The following bonds were delivered to me by the Rialto Irrigation District under my contract with it of date January 2nd, 1895, for the construction of pipe-lines for it, upon the following dates:

February 5th, 1895, bonds numbered 426 to 451;

March 2nd, 1895, bonds numbered 452 to 460;

April 6th, 1895, bonds numbered 461 to 464;

March 2nd, 1897, bonds numbered 465 to 473.”

It thus appears from the record that the only bonds delivered under the contract of January 2nd, 1895, referred to in the opinion of the court, are bonds numbered 426 to 473, inclusive, 48 in number. They will be hereafter referred to as the void bonds.

The amended complaint in 2491 is based entirely on portions of these 48 void bonds. [Tr. p. 20, bond 426, and Tr p. 26, bonds 427-473.] The supplemental complaint in 2491 is based upon some of the coupons upon the 48 void bonds and some coupons upon 11 valid bonds. None of the 48 void bonds are involved in either of the other cases.

No question of void bonds being involved in either 2492 or 2493, we ask that the judgments in those cases be reduced in the amount of the barred coupons. Counsel for the district, on pages 141 to 147 of their brief, have given us the amount of the barred coupons. These figures are correct. Counsel say, page 144:

“If the statute of limitation is held to be applicable to the case at bar, then under the stipulation and order of court above referred to, the judgment in case No. 2492 should be reduced by \$61,759.85 on account of barred coupons sued upon in that case, and in case No. 2493 the judgment should be reduced by \$4,367.00 on account of barred coupons sued upon in that case.”

These being the exact amounts in which we have asked that the judgments be reduced in cases Nos. 2492 and 2493, we submit that orders should be made in those cases accordingly.

The amount claimed in the amended complaint in case No. 2491 is \$30,009.00 [Tr. p. 29], the supple-

mental complaint adds a third cause of action [Tr. p. 42] in which a claim is made for \$20,568.70 more, making the total claim \$50,577.70 [Tr. p. 48]. The \$30,009.00 in the amended complaint is all based upon void bonds; the \$20,568.70 of the supplemental complaint is based partly on void bonds, partly upon barred coupons of valid bonds and partly upon coupons of valid bonds which are not barred.

We ask that the judgment rendered in the lower court in 2991 be reduced by deducting therefrom the sum of \$47,930.00. This sum is made up of the following items:

First. Void bonds in the amended complaint .....	\$30,009.00
Second. Void bonds, supplemental complaint	11,870.40
Third. Barred coupons, supplemental complaint .....	6,050.60
	<hr/>
	\$47,930.00

That the first of these items, void bonds in the amended complaint, should be deducted is clear from the statement that they are void.

As to the other two items:

The supplemental complaint is based upon some installment and interest coupons upon void bonds and some installment and interest coupons upon valid bonds, some of which are barred.

The following is a statement of the entire claim under the supplemental complaint:

# INTEREST COUPONS.

By the supplemental complaint a third count is added to the complaint [Tr. p. 42]; in the first portion of that third count is set out coupon No. 35, amount \$6.60, attached to bond No. 426, one of the void bonds [Tr. p. 43].

Paragraph IV of this third count by reference to paragraph II of the complaint describes bonds Nos. 427 to 473, the rest of the void bonds [paragraph IV of third count, Tr. p. 44; paragraph II, second count, Tr. p. 26]. In paragraph V of the third count [Tr. pp. 44 and 45] eleven other bonds are described, viz.: Nos. 77, 78, 234, 665, 666, 667, 798, 894, 895, 896 and 989 (none of which are included among the void bonds. See testimony of N. W. Stowell quoted above)—thus a total of 59 bonds are described in the third count, and in paragraph VI of that count is a description of the interest coupons upon which the supplemental complaint is based [Tr. pp. 45 and 46]. Some of these coupons are alleged to be attached to all of the 59 bonds involved and some only to a part thereof. For convenience we here tabulate this description as follows:

59 bonds, each	6 coupons, Nos. 35 to 40	= \$1610.70
11 bonds, each	14 coupons, Nos. 21 to 34	= 1848.00
6 bonds, each	9 coupons, Nos. 12 to 20	= 810.00
4 bonds, each	2 coupons, Nos. 10 and 11	= 120.00
5 bonds, each	1 coupon, No. 9	= 75.00
3 bonds, each	1 coupon, No. 8	= 45.00

---

Total interest coupons.....\$4508.70



# INSTALLMENT COUPONS.

In paragraph III of the third cause of action coupon No. 8, attached to bond No. 426, is set out [Tr. p. 46]; in paragraph VII of the same cause of action the amount of the installment coupons involved in that cause of action are set out [Tr. p. 46]. Tabulation as follows:

59 bonds, each 3 coupons, Nos. 8-10=	\$12,980.00
11 bonds, each 7 coupons, Nos. 1-7 =	3,080.00
	<hr/>
Total installment coupons.....	\$16,060.00
Add interest coupons.....	4,508.70
	<hr/>
Amount claimed in third count.....	\$20,563.70

(The prayer of the supplemental complaint is for \$50,577.70 [Tr. p. 48], being the amount of the amended complaint, \$30,009.00, and the above, \$20,563.70.)

The second item making up the total deduction of \$47,930.00, viz.: "Void bonds, supplemental complaint, \$11,870.40," consists of the total amount of the void installment and interest coupons set forth in that complaint; the first item of the foregoing tabulation of the entire claim under the supplemental complaint is "59 bonds, each 6 coupons, Nos. 35 to 40, \$1610.70." The 59 bonds there referred to include the 48 void bonds—so that 6 coupons of each of these 48 void bonds are void, the total of these coupons, being 6 coupons on each of 48 bonds, is \$1310.40. This amount, \$1310.40, is made up of

48 coupons, Nos. 35, \$6.60 each=	\$ 316.80
48 coupons, Nos. 36, \$6.60 each=	316.80
48 coupons, Nos. 37, \$4.65 each=	223.20

48 coupons, Nos. 38, \$4.65 each=	223.20
48 coupons, Nos. 39, \$2.40 each=	115.20
48 coupons, Nos. 40, \$2.40 each=	115.20

Total .....	\$1310.40
-------------	-----------

The amount of coupon No. 35 is shown on page 143 of the brief of plaintiff in error as \$6.60 as given above, and the amounts of coupons 36 to 40 is shown by a calculation of the interest upon the unpaid portion of the bonds, to-wit, at the same ratio of decrease in amount of interest coupons shown in the tabulation on pages 142 and 143 of the said brief of plaintiff in error.

The first item of the foregoing tabulation under the heading "Installment Coupons" is of 59 bonds each, 3 coupons Nos. 8 to 10, \$12,980.00." This item also includes 3 coupons Nos. 8 to 10 on 48 of the void bonds. The amounts of these coupons Nos. 8 to 10 are as follows: No. 8 \$65.00 each, No. 9 \$75.00 each, No. 10 \$80.00 each. This is shown by the copy of the bond appearing on page 20 of the transcript of record and the copy of coupon No. 8, page 44; coupon No. 8 is for \$65.00 and is payable January 1, 1909, being 18 years from the date of the bond and for 13% of the principal. No copy of coupons 10 or 11 appears in the record but by the terms of the bonds these coupons would be for 15% and 16% respectively, making No. 10 for \$75.00 and No. 11 for \$80.00, as stated above. The total of these void coupons is as follows:

\$65.00+\$75.00+\$85.00=\$220.00x48=	\$10,560.00
To which we add the previous amount of	1,310.40
	<hr/>
	\$11,870.40

The third item making up the total deduction of \$47,930.00, viz.: "Barred coupons, supplemental complaint, \$6,050.60," is taken from the figures furnished in the brief of counsel for the district (pages 142 and 143), except as noted, showing total amount of the barred coupons, both interest and installment, as follows (giving the totals only):

Interest coupons .....	\$3,287.40
Installment coupons .....	3,080.00
	<hr/>
	\$6,367.40

The last item of the barred coupons appearing on page 143 of the brief and being for coupons No. 35 of \$6.60 each upon 59 bonds, includes the coupons upon the 48 void bonds which are included in the item of \$11,870.40, being the second item above referred to—the amount of these 48 coupons No. 35 of \$6.60 each, viz.: \$316.80, must be deducted from the total of \$6367.40 given in the brief as the barred interest and installment coupons as follows:

Amount stated in brief.....	\$6,367.40
Coupons on void bonds.....	316.80
	<hr/>
Balance.....	\$6,050.60

This last amount is the amount of the third item making up the deduction of \$47,930.00.

#### RECAPITULATION.

No. 2493—deduction asked \$4,367.00.....\$ 4,367.00

The barred coupons shown in brief of plaintiff in error (p. 144).

No. 2492—deduction asked.....\$61,759.85

The barred coupons shown in brief of plaintiff in error (p. 144).

No. 2491—deduction asked.....\$47,930.00

Void bonds, amended complaint..\$30,009.00

Void bonds, supplemental com-

plaint ..... 11,870.40

Barred coupons, supplemental

complaint ..... 6,050.60

---

\$47,930.00

If the court should disagree with our contention that the record shows the amount of these deductions from the judgments then we ask that the court make an appropriate provision in the order of reversal in each case directing the lower court to ascertain the amount of the bonds involved which are void under contract of January 2nd, 1895, referred to in the opinion filed October 15th, 1917, in case No. 2491, and also the amount of the bonds which are barred by the statute of limitations as held in said opinion and that when these amounts are ascertained the court be directed to deduct the same from the judgments entered in said court, said judgments to be affirmed in other respects.

Plaintiff in error, Rialto Irrigation District, to recover costs.

Respectfully submitted,

J. W. SWANWICK,

*Attorney for Defendants in Error.*





No. 2503

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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Transcript of Record.  
(IN THREE VOLUMES.)

---

A. B. HAMMOND,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

---

VOLUME I.

(Pages 1 to 256, Inclusive.)

---

Upon Writ of Error to the United States District Court  
of the Northern District of California,  
Second Division.

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Filed

NOV 11 1914

E. D. AMMON.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the Circuit Court of the United States, Ninth  
Circuit, Northern District of California.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

**Complaint.**

Plaintiff complains of the defendant and for cause of action alleges:

I.

The defendant, A. B. Hammond, is a citizen of the State of California, and a resident and inhabitant of the Northern Judicial District of said State.

II.

That from the time of its manufacture, until the appropriation, use, sale and conversion of the same, as hereinafter alleged, the plaintiff was the owner of certain lumber, to wit, 21,185,410 feet, board measure of lumber, hereinafter mentioned.

That prior to the sawing and manufacture of the said lumber the same was timber standing and growing upon the following described public lands of the United States, to wit:

Sec. 2, T. 11 N., R. 16 W.,

Sec. 12, T. 11 N., R. 16 W.,

Sec. 14, T. 11 N., R. 16 W.,

S.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  of NW.

$\frac{1}{4}$ , NW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  of Sec. 10, T. 11 N.,  
R. 16 W.,

Sec. 6, T. 11 N., R. 15 W.,  
 Sec. 8, T. 11 N., R. 15 W., [1\*]  
 Sec. 18, T. 11 N., R. 15 W.,  
 Sec. 20, T. 11 N., R. 15 W.,  
 Sec. 22, T. 11 N., R. 15 W.,  
 Sec. 26, T. 11 N., R. 15 W.,  
 NW.  $\frac{1}{4}$ , Sec. 18, T. 13 N., R. 14 W.,  
 NW.  $\frac{1}{4}$ , Sec. 2, T. 14 N., R. 14 W.,  
 SE.  $\frac{1}{4}$ , Sec. 8, T. 14 N., R. 14 W.,  
 E.  $\frac{1}{2}$  and S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , Sec. 22, T. 14 N., R.  
 14 W.,  
 SE.  $\frac{1}{4}$ , Sec. 28, T. 14 N., R. 14 W.,  
 NW.  $\frac{1}{4}$ , Sec. 34, T. 14 N., R. 14 W.,  
 S.  $\frac{1}{2}$ , Sec. 18, T. 14 N., R. 15 W.,  
 S.  $\frac{1}{2}$ , Sec. 20, T. 14 N., R. 15 W.,  
 N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , Sec. 26, T. 14 N., R. 16 W.,  
 NW.  $\frac{1}{4}$ , Sec. 28, T. 14 N., R. 16 W.

That the township and range used in the foregoing description are parts of and in accordance with the United States system of surveys based upon what is known as the "Montana Meridian," and to make the said description complete the words "Montana Meridian" are to be taken as following the range numbers as given in the foregoing description. All said lands are located in the State of Montana.

That this plaintiff was at all times herein mentioned the owner of all the timber cut and removed from said lands.

### III.

That the defendant herein during the year 1885 and from said time down to and including the year

\*Page-number appearing at foot of page of original certified Record.

1894, the exact time or times plaintiff being unable more particularly to state, entered upon the afore-said lands and cut down, felled and removed and caused to be cut down, felled and removed timber that had been standing and growing upon said lands.

That said timber was sufficient in quantity so that when manufactured into lumber the same made said 21,185,410 feet, [2] board measure of lumber. That after being so cut down, felled and removed the said defendant manufactured and caused to be manufactured the same into 21,185,410 feet, board measure, of lumber herein mentioned. That said defendant in committing the said acts in this paragraph last named acted as the general manager in charge of and directing all of the business of a certain corporation, incorporated, organized and existing under and by virtue of the laws of the State of Montana, to wit, a corporation known as "The Montana Improvement Company, Limited," and a corporation known as "The Black Foot Milling and Manufacturing Company."

#### IV.

That between January 1st, 1885, and January 1st, 1895, the exact time or times plaintiff being unable more particularly to state, the defendant appropriated, used and sold, and caused to be appropriated, used and sold, by the said corporations and converted and caused to be converted to his own use and the use of the said corporations the whole of the said lumber hereinbefore described. Whereby, the whole of the said lumber was lost to this plaintiff.



## V.

That the defendant had not nor had said corporations any right whatever to said lands, or to said timber, or to the timber cut or removed therefrom, or to the said lumber which was so manufactured from the said timber.

## VI.

That the value of the said timber last described was One Dollar (\$1) per thousand feet, board measure, while standing; that the value of the same after being felled and prepared for sawing into lumber was Five Dollars (\$5) per thousand feet, board measure, and that the value of the same after being manufactured into lumber was Ten Dollars (\$10) per thousand feet, board measure. [3]

## VII.

That the acts of the said defendant in cutting and removing the said timber from this plaintiff's lands, and in manufacturing the same into lumber, and in appropriating and using said lumber, as hereinbefore alleged, wronged, damaged and injured this plaintiff in the sum of \$211,854.10, the value of the said lumber after being manufactured from said timber as aforesaid.

## VIII.

That the acts of the said defendant hereinbefore complained of were all committed wilfully and knowingly and with full knowledge that the said timber and lumber so used and appropriated were the property of this plaintiff, and that said defendant had not nor had the said corporations any right whatsoever thereto.

IX.

That the amount of the said timber so cut from this plaintiff's lands is given in this complaint as correctly and accurately as circumstances will permit. No measurement of the said manufactured lumber can be obtained by this plaintiff, but that the facts in regard thereto are in the possession of defendant. That the estimate of the said timber and lumber so taken from the plaintiff's lands is ascertained and stated in this complaint by actual stumpage measurement upon the ground. Said timber was also manufactured into lumber by defendant at mills operated and owned by the said corporations and conducted and managed by the said defendant.

That said defendant has full knowledge as to the manner in which the said cutting occurred the same having occurred under his immediate direction and control, and as to the manner in which and the times at which the said lumber was so manufactured from the said timber, said lumber having been manufactured under the direction and control of the said defendant, and that said defendant knows the uses to which the said lumber was put. [4]

That this plaintiff is unable to give more particularly the description of the said timber so removed from its lands, of the said lumber manufactured from the said timber, but that the estimate and statement of the quantity thereof contained in this complaint is correct and the value thereof is correctly stated.

## X.

That the trespasses and wrongful acts of the defendant hereinbefore stated to have been committed by him were continuing in their nature and constituted and were in pursuance of a plan on the part of the said defendant and the said corporations to cut and appropriate and manufacture into lumber the whole of the timber cut from plaintiff's lands and manufactured by said defendant as hereinbefore alleged.

That said trespasses and wrongful acts of the said defendant, as committed by said defendant, extended through a series of years, and that the plaintiff is unable to state what cutting and what manufacturing of lumber from the timber cut occurred in particular months or in particular years, or what appropriations of its timber or its lumber occurred in particular months or in particular years. That said cutting and manufacturing were extensive and were in the exclusive charge of the said defendant and that the said defendant has knowledge of all the details and facts in regard thereto.

That the corporations hereinbefore referred to ceased to exist since the commission of said acts herein complained of and charged to have been committed by said defendant.

WHEREFORE, plaintiff prays judgment against said defendant A. B. Hammond for the sum of Two Hundred and Eleven Thousand Eight Hundred and Fifty-four and 10/100 (211,854.10) Dollars.

ROBT. T. DEVLIN,  
United States Attorney.

[Endorsed]: Filed June 24th, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [5]

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**Summons.**

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Judicial  
Circuit, Northern District of California.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

Action brought in the said Circuit Court and the complaint filed in the office of the Clerk of the said Circuit Court, in the City and County of San Francisco.

ROBT. T. DEVLIN,  
Attorney for Plaintiff.

The President of the United States of America,  
Greeting: To A. B. Hammond, Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR and answer the Complaint in an action entitled as above, brought against you in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, within ten days after the service on you of this Summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages



demand in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the complaint.

WITNESS the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 24th day of June, in the year of our Lord one thousand nine hundred and ten and of our independence the 134th.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [6]

United States Marshal's Office,  
Northern District of California.

I HEREBY CERTIFY that I received the within Summons on the 25th day of June, 1910, and personally served the same on the 28th day of June, 1910, upon A. B. Hammond the defendant therein named, by delivering to and leaving with said A. B. Hammond, said defendant named therein, personally, at the City and County of San Francisco, in said District, a copy thereof, together with a copy of the Complaint, attached thereto.

C. T. ELLIOTT,

U. S. Marshal.

By B. F. Towle,

Office Deputy.

Dated at San Francisco this 28th day of June, 1910.

[Endorsed]: Filed Jun. 28, 1910. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [7]

*In the Circuit Court of the United States, Ninth Circuit,  
Northern District of California.*

No. 15,130.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

**Demurrer.**

Now comes defendant above named and demurs to the complaint herein upon the following grounds:

1.

That said complaint does not state facts sufficient to constitute a cause of action.

2.

That this Court is without jurisdiction of the subject matter of this action inasmuch as said action is one to recover damages for trespass upon, or in the nature of trespass to, real property wholly situated within the State of Montana.

3.

That this Court is without jurisdiction of the subject matter of this action inasmuch as said action while commenced as one at law is, in reality, a suit in equity for an accounting and discovery.

4.

That this Court is without jurisdiction of the subject matter of this action inasmuch as said complaint is in effect a bill in equity for a discovery and accounting and the plaintiff has a plain, speedy and adequate remedy at law.

## 5.

That said complaint is uncertain in this, that it cannot be ascertained therefrom what was the quantity of timber which it is [8] alleged in said complaint was cut down, felled and removed.

## 6.

That said complaint is uncertain in this, that it cannot be ascertained therefrom at what time or times between and from the years 1885 to and including the year 1894 the timber, or any thereof, alleged in said complaint to have been cut down, felled and removed was in fact cut down, felled and removed, or cut down, felled or removed.

## 7.

That said complaint is uncertain in this, that it cannot be ascertained therefrom at what time or times between and from the years 1885 to and including the year 1894 the lumber or any thereof, alleged in said complaint to have been manufactured and sold from the lumber alleged to have been cut down, felled and removed, was in fact so manufactured and sold.

## 8.

That said complaint is uncertain in this, that it cannot be ascertained therefrom at what time or times between January 1st, 1885, and January 1st, 1895, defendant appropriated, used or sold or caused to be appropriated, used or sold or converted the lumber described in said complaint.

## 9.

Said complaint is uncertain in this, that it cannot be ascertained therefrom what part of the timber

and lumber alleged in said complaint to have been converted was converted by "The Montana Improvement Company, Limited," and defendant, on the one hand and by "The Black Foot Milling and Manufacturing Company" and defendant on the other hand.

10.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain. [9]

11.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

12.

That said complaint is uncertain in this, that it cannot be ascertained therefrom whether defendant and "The Montana Improvement Company, Limited," converted timber and lumber from all of the lands in said complaint described, or only from certain of said lands.

13.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

14.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

15.

That said complaint is uncertain in this, that it cannot be ascertained therefrom from which of the



lands particularly described in said complaint defendant and "The Montana Improvement Company, Limited," converted timber and lumber as alleged in said complaint.

16.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

17.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

18.

That said complaint is uncertain in this, that it cannot be ascertained therefrom whether defendant and "The Black Foot Milling and Manufacturing Company" converted timber and lumber [10] from all of the lands in said complaint described or only from certain of said lands.

19.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

20.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

21.

That said complaint is uncertain in this, that it cannot be ascertained therefrom from which of the lands particularly described in said complaint defendant and "The Black Foot Milling and Manu-

facturing Company," converted timber and lumber as alleged in said complaint.

22.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

23.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

24.

That said complaint is uncertain in this, that it cannot be ascertained therefrom how much of the said lumber and timber alleged to have been converted was taken from the water-shed of the Big Black Foot River and how much thereof from the water-shed of the Hell Gate River.

25.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

26.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain. [11]

27.

That said complaint is uncertain in this, that it cannot be ascertained therefrom how much of the timber and lumber alleged in said complaint to have been converted was taken from T. 14 N., R. 16 W.; T. 14 N., R. 15 W.; T. 14 N., R. 14 W., and T. 13 N., R. 14 W., as described in said complaint, and how

much was taken from T. 11 N., R. 16 W. and T. 11 N., R. 15 W. as described in said complaint.

28.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

29.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

30.

That said complaint is uncertain in this, that it cannot be ascertained therefrom at what place or places the act of conversion of the timber and lumber alleged in said complaint to have been converted in fact took place.

31.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

32.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

33.

That said complaint is uncertain in this, that it cannot be ascertained therefrom where the mills at which it is alleged in said complaint that the said lumber was manufactured, were or where any of said mills was situated.

34.

That said complaint is ambiguous in the respect

and for the [12] reason in which it is last herein stated to be uncertain.

35.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

36.

Said complaint is uncertain in this, that *that* while the value of the timber and lumber alleged to have been cut and converted is in its several stages from timber to manufactured lumber set forth in said complaint, particularly in paragraph 6 thereof, nevertheless, it cannot be ascertained from said complaint as of what place or places said valuations or any of them are computed.

37.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

38.

That several causes of action are set forth in said complaint, but are not separately stated, in this, that a cause of action against the defendant arising against defendant by reason of his relation to "The Montana Improvement Company, Limited," is joined with a cause of action arising against defendant by reason of his relation to "The Black Foot Milling and Manufacturing Company," and that said causes of action are not separately stated in said complaint.

39.

That several causes of action have been improp-



erly united in said complaint in this, that a cause of action arising against defendant by reason of his relation to "The Montana Improvement Company, Limited," is improperly united with a cause of action arising against defendant by reason of his relation to "The Black Foot Milling and Manufacturing Company."

WHEREFORE, defendant prays that this his demurrer be [13] sustained and that he have and recover his costs herein incurred.

W. S. BURNETT,

Attorney for Defendant.

The service upon defendant above named of all documents and papers other than writs and processes may be made upon defendant's attorney, W. S. Burnett, Care of Hammond Lumber Company, 9th Floor Merchants' Exchange Building, San Francisco, Cal. (After July 30th, 1910, the address will be 9th Floor, Newhall Building, San Francisco, Cal.)

Received a copy of the within demurrer this 8th day of July, 1910.

ROBT. T. DEVLIN,

Attorney for Deft.

[Endorsed]: Filed Jul. 8, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[14]

*In the Circuit Court of the United States, Ninth Circuit,  
Northern District of California.*

No. 15,130.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

**Amended Demurrer.**

Now comes the defendant above named and as of course, after the filing of his demurrer herein, but before the trial of the issue of law thereon, files his amended demurrer herein, and demurs to the complaint herein upon the following grounds:

1.

That said complaint does not state facts sufficient to constitute a cause of action.

2.

That this Court is without jurisdiction of the subject matter of this action inasmuch as said action is one to recover damages for trespass upon, or in the nature of trespass to, real property wholly situated within the State of Montana.

3.

That this Court is without jurisdiction of the subject matter of this action inasmuch as said action while commenced as one at law is, in reality, a suit in equity for an accounting and discovery.

4.

That this Court is without jurisdiction of the sub-

ject matter of this action inasmuch as said complaint is in effect a bill in equity for a discovery and accounting and the plaintiff has a plain, speedy and adequate remedy at law. [15]

5.

That said complaint is uncertain in this, that it cannot be ascertained therefrom at what time or times between and from the years 1885 to and including the year 1894 the timber, or any thereof, alleged in said complaint to have been cut down, felled and removed was in fact cut down, felled and removed, or cut down, felled or removed.

6.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

7.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

8.

That said complaint is uncertain in this, that it cannot be ascertained therefrom at what time or times between and from the years 1885 to and including the year 1894 the lumber, or any thereof, alleged in said complaint to have been manufactured and sold from the lumber alleged to have been cut down, felled and removed, was in fact so manufactured and sold.

9.

That said complaint is uncertain in this, that it cannot be ascertained therefrom at what time or

times between January 1st, 1885, and January 1st, 1895, defendant, appropriated, used or sold or caused to be appropriated, used or sold or converted the lumber described in said complaint.

10.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

11.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain. [16]

12.

Said complaint is uncertain in this, that it cannot be ascertained therefrom what part of the timber and lumber alleged in said complaint to have been converted was converted by "The Montana Improvement Company, Limited," and defendant, on the one hand and by "The Black Foot Milling and Manufacturing Company" and defendant on the other.

13.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

14.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

15.

That said complaint is uncertain in this, that it cannot be ascertained therefrom whether defendant



and "The Montana Improvement Company, Limited," converted timber and lumber from all of the lands in said complaint described, or only from certain of said lands.

16.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

17.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

18.

That said complaint is uncertain in this, that it cannot be ascertained therefrom from which of the lands particularly described in said complaint defendant and "The Montana Improvement Company, Limited," converted timber and lumber as alleged [17] in said complaint.

19.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

20.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

21.

That said complaint is uncertain in this that it cannot be ascertained therefrom whether defendant and "The Black Foot Milling and Manufacturing Company" converted timber and lumber from all of

the lands in said complaint described or only from certain of said lands.

22.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

23.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

24.

That said complaint is uncertain in this, that it cannot be ascertained therefrom from which of the lands particularly described in said complaint defendant and "The Black Foot Milling and Manufacturing Company" converted timber and lumber as alleged in said complaint.

25.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

26.

That said complaint is unintelligible in the respect and [18] for the reason in which it is last herein stated to be uncertain.

27.

That said complaint is uncertain in this, that it cannot be ascertained therefrom how much of the said lumber and timber alleged to have been converted was taken from the water-shed of the Big Black Foot River and how much thereof from the water-shed of the Hell Gate River.

28.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

29.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

30.

That said complaint is uncertain in this, that it cannot be ascertained therefrom how much of the timber and lumber alleged in said complaint to have been converted was taken from T. 14 N., R. 16 W.; T. 14 N., R. 15 W.; T. 14 N., R. 14 W.; and T. 13 N., R. 14 W., as described in said complaint, and how much was taken from T. 11 N., R. 16 W. and T. 11 N., R. 15 W. as described in said complaint.

31.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

32.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

33.

That said complaint is uncertain in this, that it cannot be ascertained therefrom how much timber it is claimed by plaintiff was cut off each quarter section of land in said complaint described. [19]

34.

That said complaint is ambiguous in the respect

and for the reason in which it is last herein stated to be uncertain.

35.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

36.

That said complaint is uncertain in this, that it cannot be ascertained therefrom how much timber it is claimed by plaintiff was cut off each forty acre subdivision or in other words, each quarter of each quarter section embraced in the land described in said complaint.

37.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

38.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

39.

That said complaint is uncertain in this, that it cannot be ascertained therefrom whether or not it is one or several acts of conversion that is complained of therein.

40.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

41.

That said complaint is unintelligible in the respect



and for the reason in which it is last herein stated to be uncertain.

42.

That said complaint is uncertain in this, that it cannot be ascertained therefrom at what place or places the act of conversion or conversions of the timber and lumber alleged in said complaint [20] to have been converted in fact took place.

43.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

44.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

45.

That said complaint is uncertain in this, that it cannot be ascertained therefrom where the mills at which it is alleged in said complaint that the said lumber was manufactured were or where any of said mills was situated.

46.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

47.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

48.

Said complaint is uncertain in this, that while the

value of the timber and lumber alleged to have been cut and converted is in its several stages from timber to manufactured lumber set forth in said complaint, particularly in paragraph 6 thereof, nevertheless, it cannot be ascertained from said complaint as of what place or places said valuations or any of them are computed.

## 49.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

## 50.

That several causes of action are set forth in said complaint, but are not separately stated, in this, that a cause of [21] action against the defendant arising against defendant by reason of his relation to "The Montana Improvement Company, Limited," is joined with a cause of action arising against defendant by reason of his relation to "The Black Foot Milling and Manufacturing Company," and that said causes of action are not separately stated in said complaint.

## 51.

That several causes of action have been improperly united in said complaint in this, that a cause of action arising against defendant by reason of his relation to "The Montana Improvement Company, Limited," is improperly united with a cause of action arising against defendant by reason of his relation to "The Black Foot Milling and Manufacturing Company."

52.

That said complaint is uncertain in this, that it cannot be ascertained therefrom in what way defendant was connected, if at all, with the commission of the conversion or conversions set forth in said complaint.

53.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

54.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

55.

That said complaint is uncertain in this, that it cannot be ascertained therefrom in what way, whether by personal participation or otherwise, the defendant acting as General Manager in charge of and directing all the business of the corporations mentioned in said complaint cut down, felled and removed, or cut down, felled or removed the timber referred to in said complaint. [22]

56.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

57.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

58.

That said complaint is uncertain in this, that it cannot be ascertained therefrom in what way the cutting of the timber alleged in said complaint occurred under the immediate direction and control of defendant.

59.

That said complaint is ambiguous in the respect and for the reason in which it is last herein stated to be uncertain.

60.

That said complaint is unintelligible in the respect and for the reason in which it is last herein stated to be uncertain.

WHEREFORE, defendant prays that this his amended demurrer be sustained and that he have and recover his costs herein incurred.

W. S. BURNETT,  
Attorney for Defendant.

The service upon defendant above named of all documents and papers other than writs and processes may be made upon defendant's attorney, W. S. Burnett, 260 California Street, San Francisco, Cal.

Received copy of the within demurrer this 22d day of December, 1910.

ROBT. T. DEVLIN,  
Atty. for Plaintiff.

[Endorsed]: Filed Dec. 22, 1910. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.  
[23]



At a stated term, to wit, the March term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Courtroom in the City and County of San Francisco, on Saturday, the 13th day of May, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,130.

THE UNITED STATES OF AMERICA

vs.

A. B. HAMMOND.

**Order Overruling Demurrer.**

Defendant's demurrer to the complaint herein heretofore heard and submitted being now fully considered, it was ordered that said demurrer be and the same is hereby overruled, with leave to the defendant to answer within thirty days. [24]

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*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

No. 15,130.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

**Answer.**

Now comes defendant above named, and for answer to the complaint filed herein denies generally and specifically each and every allegation therein contained and the whole and every part thereof.

1.

And for a further and separate defense and answer to so much of said complaint as charges that timber standing and growing upon the lands described in said complaint as being within Township 11 North, Range 15 West and Township 11 North, Range 16 West of the "Montana Meridian" was cut down, felled and removed, or cut down, felled or removed, and manufactured into lumber, or manufactured into lumber, and appropriated, used, sold and converted, or appropriated, used sold or converted by defendant or the corporations, or either of them named in said complaint, or by any joint tort-feasor of defendant, or by anyone for whose acts defendant is responsible, this defendant avers that said lands last mentioned were and each of said subdivisions thereof was at the time of such cutting down, felling and removing or cutting down, or felling, or removing, mineral lands and not subject to entry under the then existing laws of the United States, except for mineral entry, and that such timber cut therefrom was felled and removed therefrom under and in pursuance of the provisions of [25] the Act of June 3, 1878, Chapter 150, by *bona fide* residents of the State of Montana, not railroad corporations, for and was exclusively used in building, agri-

cultural, mining and other domestic purposes within the State of Montana in compliance with the rules and regulations prescribed from time to time by the Secretary of the Interior in pursuance of the provisions of the said statute last mentioned. That defendant does not know, cannot ascertain and is therefore unable to state the amount of such timber cut down, felled and removed or cut down, felled, or removed from said lands or any part thereof.

## 2.

And for a further and separate defense and answer to so much of said complaint as charges that timber standing and growing upon the lands described in said complaint as being within Township 11 North, Range 15 West and Township 11 North, Range 16 West of the "Montana Meridian" was cut down, felled and removed, or cut down, felled or removed, and manufactured into lumber, or manufactured into lumber, and appropriated, used, sold and converted or appropriated, used, sold or converted, by defendant, or the corporations, or either of them named in said complaint, or by any joint tort-feasor of defendant, or by anyone for whose acts defendant is responsible, this defendant avers that said lands last mentioned were and each of said subdivisions thereof was at the time of such cutting down, felling and removing or cutting down, or felling, or removing, mineral lands and not subject to entry under the then existing laws of the United States, except for mineral entry, as the said terms "mineral lands and not subject to entry under existing laws of the United States except for mineral entry" were then under-

stood and construed by the Secretary of the Interior, and the federal courts and that such timber cut therefrom was felled and removed therefrom under and in pursuance [26] of the provisions of the Act of June 3, 1878, Chapter 150, as said provisions were then understood and construed by the Department of the Interior and the federal courts, by *bona fide* residents of the State of Montana, not railroad corporations, for and was exclusively used in building, agricultural, mining and other domestic purposes within the State of Montana, and not transported therefrom, in compliance with the rules and regulations prescribed from time to time by the Secretary of the Interior in pursuance of the provisions of the said statute last mentioned, and this defendant further pleads the provisions of Section 8 of the Act of March 3, 1891, Chapter 561, 26 Statutes at Large, page 1099, as amended by the Act of March 3, 1891, Chapter 559, 26 Statutes at Large, page 1093, as a defense to the alleged cutting down, felling and removing or cutting down, felling or removing of such timber and to the manufacturing thereof into lumber and to the appropriation, use, sale and conversion or appropriation, use, sale, or conversion thereof. That defendant does not know, cannot ascertain and is therefore unable to state the amount of such timber cut down, felled and removed, or cut down, felled or removed from said lands, or any part thereof.

3.

And for a further and separate defense and answer to so much of said complaint as charges that timber standing and growing upon the lands de-



scribed in said complaint upon the South half of Section 18, Township 14 North, Range 15 West of the "Montana Meridian" was cut down, felled and removed, or cut down, felled or removed, and manufactured into lumber, or manufactured into lumber, and appropriated, used, sold and converted, or appropriated, used, sold or converted by defendant, or the corporations, or either of them named in said complaint, or by any joint tort-feasor [27] of defendant or by anyone for whose acts defendant is responsible this defendant avers that said Section 18 is and was an irregular section comprised of lots, namely, three tiers of lots running from west to east and four tiers of lots running from north to south; that the South half of said section was and is composed of lots Nos. 7, 8 and 9, reading from east to west, said lots containing respectively 38.12 acres, 38.12 acres and 45.32 acres and constituting the North half of said South half of said section and lots No. 10, 11 and 12, reading from west to east, each containing respectively 45.43 acres, 38.12 acres and 38.12 acres and constituting the South half of the South half of said section.

That defendant is informed and believes, and upon such information and belief alleges, that a corporation then and still organized, existing and doing business under the laws of the State of Montana, to wit, Big Blackfoot Milling Company, in the months of November and December, 1892, logged said lots Nos. 7, 8, 11, and 12 under and by virtue of mesne conveyances from one William Tuchenhausen, to whom patent for said lots last mentioned was duly and regu-

larly issued by plaintiff on the 16th day of November, 1891. That defendant was not at said time an officer of the said corporation other than a director thereof and did not personally participate in or direct or control its operations in general or in reference to the logging of said lots last mentioned and defendant has not been an officer of said corporation of any kind or in any wise connected therewith, or a stockholder thereof, since the year 1898. That on the 16th day of January, 1892, Hon. John M. Noble, Secretary of the Department of the Interior, in conformity with the provisions of an Act of Congress approved March 3, 1891, entitled "An Act to amend Section 8 of an Act approved March 3, 1891, entitled 'An Act to Repeal Timber Culture [28] Laws and for other purposes,' " and rules and regulations promulgated by the Secretary of the Interior for the execution of said Act, issued a permit unto the said Big Blackfoot Milling Company to cut timber on certain public lands in the State of Montana, which among other lands therein described, and covered thereby, embraced "the North half of the Southwest Quarter of Section 18" in said township and range last mentioned and which provided that said permit should expire on the 31st day of January, 1893. That said permit was based upon the application theretofore made by said company and theretofore filed in the office of the Commissioner of the General Land Office, in pursuance of the rules of the Secretary of the Interior theretofore promulgated in relation thereto, and that said application sought the privilege of cutting and removing timber from cer-

tain lands therein described including the whole of said Section 18 except the Southeast Quarter thereof. That said company had at said time the right or had arranged for the right to the timber on said Southeast Quarter of said section, by reason of its acquisition of said lots 7, 8, 11 and 12 as hereinbefore in this paragraph set forth. Defendant avers upon information and belief that said corporation cut and removed during the life of said permit certain timber from said lot 10 in said section, while laboring under the mistaken belief that said permit authorized the cutting and removal of timber standing on the North half *and the* Southwest Quarter of said section, as applied for by it, whereas in fact said permit only authorized such cutting and removal from the North half *of the* Southwest Quarter of said section. That defendant did not know at any time that any timber was being cut or removed from said section, nor at any time directed, controlled or sanctioned the cutting and removing or cutting or removing thereof or the manufacture of the same into lumber, or the appropriation, use and conversion or the appropriation, use or conversion thereof by [29] said corporation, but by reason of the foregoing defendant avers that said corporation, or anyone charged with the responsibility for its acts, or participating therein, should not be required to respond in damages for such timber cut and removed from said lot 10 to a greater extent than the value of said timber as it stood in the tree on the ground, to wit, its stumpage value, and defendant avers that its stumpage value did not exceed the sum of fifty cents



per thousand feet. Defendant has no information and cannot ascertain the amount of timber so cut and removed or cut or removed from said lot 10.

## 4.

And for a further and separate defense and answer to so much of said complaint as charges that timber standing and growing upon the lands described in said complaint upon the Southeast Quarter of Section 28, Township 14 North of Range 14 West of the "Montana Meridian" was cut down, felled, and removed, or cut down, felled or removed, and manufactured into lumber, or manufactured into lumber, and appropriated, used, sold and converted, or appropriated, used, sold or converted by defendant, or the corporations, or either of them named in said complaint, or by any joint tort-feasor of defendant or by anyone for whose acts defendant is responsible, this defendant avers that on the twenty-third day of November, 1885, one, Henry F. Edgar filed his pre-emption declaratory statement in the United States Land Office at Helena, Montana, under and in pursuance of the provisions of Sections 2257 to 2274, each inclusive, of the Revised Statutes of the United States, alleging settlement on the said Southeast Quarter of said Section 28 on the 26th day of October, 1885, and defendant avers the fact to be that on the said 26th day of October, 1885, the said Henry F. Edgar settled in good faith upon said lands, which then and there were vacant, unoccupied and surveyed lands of the United States and subject to entry under said [30] sections of the Revised Statutes as a pre-emption claim; that said Edgar was at said time



the head of a family and a citizen of the United States; that said Edgar and his family, consisting of his wife and her son, settled as aforesaid on said land, and at once commenced the clearing thereof for cultivation and the cultivation and improvement of the same, with the end in view and for the purpose of making a home and farm for himself and his said family; that the said Edgar was qualified in all respects to so settle upon and enter upon such land and filed the oath required by said Section 2262 of the Revised Statutes and otherwise complied with the provisions of said sections of the Revised Statutes. That in pursuance of such settlement, intention and purpose, and not otherwise, the said Edgar in the fall of 1885 erected a substantial log dwelling-house about thirty-five feet by twenty feet and divided the same by partitions into suitable rooms for living purposes and finished it so as to make it a comfortable residence for himself and family at all seasons of the year. That in addition thereto he built on said land another log-house of like dimensions for the purpose of using the same as a lodging or "bunk" house, and built suitable and appropriate out-houses such as stables, chicken-houses, etc., and that during the winter of 1885 and spring of 1886 he fenced about two acres of said land and cleared off the same, putting it in cultivation and growing beans, peas, cabbages, potatoes and other like vegetables. That all the buildings and improvements constructed as aforesaid were made from timber cut upon said land and that in the clearing of said land for cultivation, and not otherwise, it became necessary for him to cut

from said land about four hundred thousand feet of timber standing thereon; that the cutting of said timber was absolutely necessary in order that the land might be cleared and subjected to agricultural purposes and made fit and comfortable for a home for himself and family. That [31] after said timber was cut, instead of burning it he sold it to one, W. H. Hammond, who was at the time operating a sawmill manufacturing lumber near the mouth of the Big Blackfoot River at a place since and now called Bonner.

That thereafter and within twelve months after his said settlement upon said land the said Edgar made his application at the United States Land Office at Helena, Montana, to make final proof and entry of said land and thereafter, after due posting and publishing as required by the provisions of said sections of the Revised Statutes and in pursuance of the Act of March 3, 1879, and the rules and regulations of the Secretary of the Interior in such cases provided he made final proof as to his said claim and paid the purchase price therefor, to wit, the sum of Four Hundred Dollars to the Register and Receiver at the said Land Office at Montana.

That thereafter and on or about the fourth day of September, 1886, the said entry was held for cancellation upon report of Special Agent M. J. Haley, then in the field in the Blackfoot Valley, and the said Edgar applied for a hearing, which was postponed at the request of the said land office authorities from time to time, so much so that the said Edgar was unable, by reason of such postponements, to have

said charges heard and disposed of, and finally in necessity and in disgust abandoned the said claim and the said claim was thereafter finally cancelled on or about the twelfth day of November, 1890, and the said Four Hundred Dollars purchase price was returned to him the said Edgar. That the said Edgar was a poor man depending upon his labor for the subsistence of himself and family and could not by reason of the uncertainty as to the disposition of his said claim expend further labor and money in the development thereof and therefore and for no other reason abandoned same. That the said land was and is [32] first-class agricultural land and the said Edgar at all times desired and intended in good faith to make of it a home and farm for himself and family.

Defendant avers that the said timber cut, removed and sold from said Southeast Quarter of said section was so cut, removed and sold in good faith by the said Edgar and purchased in like good faith by the said W. H. Hammond, and that said timber was worth not to exceed the sum of one dollar per thousand feet.

And in this behalf defendant further alleges that the act of plaintiff in returning to the said Edgar the said purchase price of Four Hundred Dollars was in itself an adjudication by said Department of the Interior under the provisions of Section 2262 of the Revised Statutes that he, the said Edgar, had been guilty of no wrongdoing or fraud and had been in fact entitled to settle upon said land and had settled upon said land as a pre-emption claim in good



faith in accordance with the provisions of said sections of the Revised Statutes, and this defendant pleads the said return of such purchase price as an adjudication upholding the good faith of the said Edgar which cannot now be attacked.

And further in this behalf defendant avers that charges were preferred against him and against the said W. H. Hammond both civil and criminal by the Department of the Interior and the Department of Justice in the fall of 1886 and again in the fall of 1889, arising out of the matters in this paragraph hereinbefore set forth, but that after a full investigation said charges were withdrawn and dismissed on or about the sixth day of April, 1892, and defendant relies upon said withdrawal and dismissal as a *re-traxit* and abandonment of said charges by plaintiff and pleads the same in bar.

And further in this behalf defendant avers that the said W. H. Hammond was not in any sense his agent or associate in purchasing said timber from the said Edgar nor was defendant in privity therewith, or participating in, directing or controlling the cutting [33] and removing, or cutting or removing of said timber or the manufacturing thereof into lumber.

WHEREFORE, defendants prays that plaintiff take nothing by its complaint herein, but that defendant have judgment for his costs herein expended.

W. S. BURNETT,  
Attorney for Defendant.



Received copy of within answer this 13th day of July, 1911.

ROBT. T. DEVLIN,  
Attorney for Plaintiff.

[Endorsed] : Filed July 14, 1911. Southard Hoffman, Clerk. [34]

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*In the District Court of the United States, Ninth Circuit, in and for the Northern District of California, Second Division.*

No. 15,130.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

A. B. HAMMOND,  
Defendant.

**Notice of Motion for Leave to File Amended Answer.**

To the Plaintiff Above Named, and to John L. McNab, Esq., Its Attorney:

You and each of you will please take notice that on Monday, the 30th day of December, 1912, at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard, defendant above named will move the above-entitled court at the courtroom thereof, in the United States Court House and Post Office Building, at Seventh and Mission Streets, San Francisco, California, for an order granting unto the defendant leave to file an amended answer herein, which said amended answer is hereto attached and made a part hereof and marked Exhibit "A."

Said motion will be made upon the ground that at the time of the preparation and filing of the original answer herein, defendant was not, and could not, by the exercise of reasonable diligence, be in possession of the facts in the case necessary for a full, true and complete answer to the matter set forth in the complaint, and upon the ground that the filing of said amended answer will be in furtherance of justice.

Said motion will be based on the pleadings and records on file in the above-entitled cause, and upon this notice and the said amended answer, Exhibit "A" hereto, and the affidavit of W. S. Burnett hereto attached, marked Exhibit "B" and made a [35] part hereof.

W. S. BURNETT,  
Attorney for Defendant. [36]

EXHIBIT "A."

*In the District Court of the United States, Ninth Circuit, Northern District of California, Second Division.*

No. 15,130.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

A. B. HAMMOND,  
Defendant.

**Amended Answer.**

Now comes defendant above-named, and by leave of Court first obtained files this, his amended answer, to the complaint herein, and for such answer avers:

That he denies generally and specifically each and every allegation therein contained and the whole and every part thereof.

1.

And for a further and separate defense and answer to so much of said complaint as charges that timber standing and growing upon the lands described in said complaint as being within Township 11 North, Range 15 West, and Township 11 North, Range 16 West, of the "Montana Meridian" was cut down, felled, and removed, or cut down, felled or removed, and manufactured into lumber, or manufactured into lumber, and appropriated, used, sold, and converted, or appropriated, used, sold or converted by defendant, or the corporations, or either of them named in said complaint, or by any joint tortfeasor of defendant, or by anyone for whose acts defendant is responsible, this defendant avers that said lands last mentioned were and each of said subdivisions thereof was at the time of such cutting down, felling and removing or cutting [37] down, or felling, or removing, mineral lands and not subject to entry under the then existing laws of the United States, except for mineral entry, and that such timber cut therefrom was felled and removed therefrom under and in pursuance of the provisions of the Act of June 3, 1878, 20 Stat. at Large, page 88, Chapter 150, by *bona fide* citizens and residents of the State or Territory of Montana, not railroad corporations, for and was exclusively used in building, agricultural, mining, and other domestic purposes within the State of Montana, in compliance with all lawful

rules and regulations prescribed from time to time by the Secretary of the Interior in pursuance of the provisions of the said statute last mentioned. That defendant does not know, cannot ascertain, and is, therefore, unable to state the amount of such timber cut down, felled and removed, or cut down, felled, or removed from said lands or any part thereof.

## 2.

And for a further and separate defense and answer to so much of said complaint as charges that timber standing and growing upon the lands described in said complaint as being within Township 11 North, Range 15 West, and Township 11 North, Range 16 West of the "Montana Meridian" was cut down, felled and removed, or cut down, felled or removed, and manufactured into lumber, or manufactured into lumber, and appropriated, used, sold and converted or appropriated, used, sold or converted, by defendant, or the corporations, or either of them named in said complaint, or by any joint tort-feasor of defendant, or by anyone for whose acts defendant is responsible, this defendant avers that said lands last mentioned were and each of said subdivisions thereof was at the time of such cutting down, felling and removing, or cutting down, or felling, or removing, mineral lands and not subject to entry under the then existing laws of the United States, except for [38] mineral entry, as the said terms "mineral lands and not subject to entry under existing laws of the United States except for mineral entry" were then understood and construed by the Secretary of the Interior, and the federal courts



and that such timber cut therefrom was felled and removed therefrom under and in pursuance of the provisions of the Act of June 3, 1878, 20 Stat. at Large, page 88, Chapter 150, as said provisions were then understood and construed by the Department of the Interior and the federal courts, by *bona fide* citizens and residents of the State or Territory of Montana, not railroad corporations, for and was exclusively used in building, agricultural, mining and other domestic purposes within the State of Montana, and not transported therefrom under rules and regulations prescribed from time to time by the Secretary of the Interior in pursuance of the provisions of the said statute last mentioned, and this defendant further pleads the provisions of Section 8 of the Act of March 3, 1891, Chapter 561, 26 Statutes at Large, page 1099, and the Act of March 3, 1891, Chapter 559, 26 Statutes at Large, page 1093, as a defense to the alleged cutting down, felling and removing or cutting down, felling or removing of such timber, and to the manufacturing thereof into lumber and to the appropriation, use, sale and conversion or appropriation, use, sale, or conversion thereof. That defendant does not know, cannot ascertain, and is therefore unable to state the amount of such timber cut down, felled and removed, or cut down, felled or removed from said lands, or any part thereof.

21½.

And for a further and separate defense and answer to so much of said complaint as charges that timber standing and growing upon the lands described in said complaint as being within Township

11 North, Range 15 West, and Township 11 North, Range 16 [39] West of the "Montana Meridian" was cut down, felled and removed, or cut down, felled or removed, and manufactured into lumber, or manufactured into lumber, and appropriated, used, sold and converted, or appropriated, used, sold or converted by defendant, or the corporations, or either of them named in said complaint, or by any joint tort-feasor of defendant, or by anyone for whose acts defendant is responsible, this defendant avers that as to timber so cut, removed, manufactured and converted, or cut, removed, manufactured or converted, civil charges were preferred against defendant by plaintiff in the month of August, 1886, averring that the timber growing upon the lands in this paragraph of this answer described had been cut, removed, and converted by defendant and one, George W. Fenwick, but that after a full investigation by plaintiff, said charges were withdrawn and dismissed on or about November 19, 1892, and defendant relies upon said withdrawal and dismissal as a *retraxit* and abandonment of said charges by plaintiff, and pleads the same in bar as a defense to the cutting, removal and conversion, or cutting, removal or conversion of any and all timber growing upon the lands in this paragraph of this answer described, and which was cut, removed and converted, or cut, or removed, or converted at any and all times prior to August 30, 1886.

3.

And for a further and separate defense and answer to so much of said complaint as charges that

timber standing and growing upon the lands described in said complaint upon the South half of Section 18, Township 14 North, Range 15 West of the "Montana Meridian" was cut down, felled and removed, or cut down, felled or removed, and manufactured into lumber, or manufactured into lumber, and appropriated, used, sold and [40] converted, or appropriated, used, sold or converted by defendant, or the corporations, or either of them named in said complaint, or by any joint tort-feasor of defendant or by anyone for whose acts defendant is responsible, this defendant avers that said Section 18 is and was an irregular section comprised of lots, namely, three tiers of lots running from west to east and four tiers of lots running from north to south; that the South half of said section was and is composed of lots No. 7, 8 and 9, reading from east to west, said lots containing respectively 38.12 acres, 38.12 acres and 45.32 acres and constituting the North half of said South half of said section and lots No. 10, 11 and 12, reading from west to east, each containing respectively 45.43 acres, 38.12 acres and 38.12 acres and constituting the South half of the South half of said section.

That defendant is informed and believes and upon such information and belief alleges that a corporation then and still organized, existing and doing business under the laws of the State of Montana, to wit, Big Blackfoot Milling Company, in the months of November and December, 1892, logged said lots Nos. 7, 8, 11 and 12 under and by virtue of mesne conveyances from one William Tuchenhausen, to



whom patent for said lots last mentioned was duly and regularly issued by plaintiff on the 16th day of November, 1891. That defendant was not at said time an officer of the said corporation other than a director thereof and did not personally participate in or direct or control its operations in general or in reference to the logging of said lots last mentioned, and defendant has not been an officer of said corporation of any kind or in any wise connected therewith, or a stockholder thereof, since the year 1898. That on the 16th day of January, 1892, Hon. John M. Noble, Secretary of the [41] Department of the Interior in conformity with the provisions of an Act of Congress approved March 3, 1891, entitled "An act to amend Section 8 of an Act approved March 3, 1891, entitled 'An act to Repeal Timber Culture Laws and for other purposes,' " and rules and regulations promulgated by the Secretary of the Interior for the execution of said Act, issued a permit unto the said Big Blackfoot Milling Company to cut timber on certain public lands in the State of Montana, which among other lands therein described, and covered thereby, embraced "the North half of the Southwest Quarter of Section 18" in said township and range last mentioned and which provided that said permit should expire on the 31st day of January, 1893. That said permit was based upon the application theretofore made by said company and theretofore filed in the office of the Commissioner of the General Land Office, in pursuance of the rules of the Secretary of the Interior theretofore promulgated in relation thereto, and that said ap-



plication sought the privilege of cutting and removing timber from certain lands therein described including the whole of said Section 18 except the Southeast Quarter thereof. That said company had at said time the right or had arranged for the right to the timber on said Southeast Quarter of said section, by reason of its acquisition of said lots 7, 8, 11 and 12 as hereinbefore in this paragraph set forth. Defendant avers upon information and belief that said corporation cut and removed during the life of said permit certain timber from said lot 10 in said section, while laboring under the mistaken belief that said permit authorized the cutting and removal of timber standing on the North half *and the* Southwest Quarter of said section, as applied for by it, whereas in fact said permit only authorized such cutting and removal from the North half *of the* Southwest Quarter of said section, that is to say, said lot 9 thereof. And [42] defendant avers that all timber cut from said lot 9 thereof was cut under and in pursuance of and in compliance with the terms of said permit and the said Act of Congress and rules and regulations prescribed by the Secretary of the Interior thereunder. That defendant did not know at any time that any timber was being cut or removed from said section, nor at any time directed, controlled or sanctioned the cutting and removing or cutting or removing thereof or the manufacture of the same into lumber, or the appropriation, use and conversion or the appropriation, use or conversion thereof by said corporation, but by reason of the foregoing defendant avers that

said corporation, or anyone charged with the responsibility for its acts, or participating therein, should not be required to respond in damages for such timber cut and removed from said lot 10 to a greater extent than the value of said timber as it stood in the tree on the ground, to wit, its stumpage value and defendant avers that its stumpage value did not exceed the sum of fifty cents per thousand feet. Defendant has no information and cannot ascertain the amount of timber so cut and removed or cut or removed from said lots 9 or 10 or either of them.

## 4.

And for a further and separate defense and answer to so much of said complaint as charges that timber standing and growing upon the lands described in said complaint upon the Southeast Quarter of Section 28, Township 14 North of Range 14 West of the "Montana Meridian" was cut down, felled, and removed, or cut down felled or removed, and manufactured into lumber, or manufactured into lumber and appropriated, used, sold and converted, or appropriated, used, sold or converted by defendant, or the corporations, or either of them named in said complaint or by any joint tort-feasor of defendant or by anyone for [43] whose acts defendant is responsible this defendant avers that on the twenty-third day of November, 1885, one, Henry F. Edgar filed his pre-emption declaratory statement in the United States Land Office at Helena, Montana, under and in pursuance of the provisions of Sections 2257 to 2274, each inclusive,

of the Revised Statutes of the United States alleging settlement on the said Southeast quarter of said Section 28 on the 26th day of October, 1885, and defendant avers the fact to be that on the said 26th day of October, 1885, the said Henry F. Edgar settled in good faith upon said lands, which then and there were vacant, unoccupied and surveyed lands of the United States and subject to entry under said sections of the Revised Statutes as a pre-emption claim; that said Edgar was at said time the head of a family and a citizen of the United States; that said Edgar and his family, consisting of his wife and her son, settled as aforesaid on said land and at once commenced the clearing thereof for cultivation and the cultivation and improvement of the same with the end in view and for the purpose of making a home and farm for himself and his said family; that the said Edgar was qualified in all respects to so settle upon and enter upon such land and filed the oath required by said Section 2262 of the Revised Statutes and otherwise complied with the provisions of said sections of the Revised Statutes. That in pursuance of such settlement, intention and purpose, and not otherwise, the said Edgar in the fall of 1885 erected a substantial log dwelling-house about thirty-five feet by twenty feet and divided the same by partitions into suitable rooms for living purposes and finished it so as to make it a comfortable residence for himself and family at all seasons of the year. That in addition thereto he built on said land another log house of like dimensions for the purpose of using the same as a lodging or "bunk" house and



built suitable and appropriate outhouses such as stables, [44] chicken-houses, etc., and that during the winter of 1885 and spring of 1886 he fenced about two acres of said land and cleared off the same putting it in cultivation and growing beans, peas, cabbages, potatoes and other like vegetables. That all the buildings and improvements constructed as aforesaid were made from timber cut upon said land and that in the clearing of said land for cultivation, and not otherwise, it became necessary for him to cut from said land about Four Hundred Thousand feet of timber standing thereon; that the cutting of said timber was absolutely necessary in order that the land might be cleared and subjected to agricultural purposes and made fit and comfortable for a home for himself and family. That after said timber was cut, instead of burning it he sold it to one W. H. Hammond, who was at the time operating a sawmill manufacturing lumber near the mouth of the Big Blackfoot River at a place since and now called Bonner.

That thereafter in the month of May, 1886, the said Edgar made his application at the United States Land Office at Helena, Montana, to make final proof and entry of said land, and thereafter, after due posting and publishing as required by the provisions of said sections of the Revised Statutes and in pursuance of the Act of March 3, 1879, and the rules and regulations of the Secretary of the Interior in such cases provided, he made final proof as to his claim and paid the purchase price therefor, to wit, the sum of Four Hundred Dollars to the Register and Re-



ceiver at the said Land Office at Montana. That defendant is informed and believes and upon such information and belief alleges that the said Edgar and the said W. H. Hammond believing, and without having notice or knowledge to the contrary, that said final proof had not been accepted and final certificate and receipt issued to him the said Edgar for his said claim, thereupon, in good faith and for the purpose of enabling the [45] further agricultural development of the said claim, and not otherwise, cut and removed therefrom the merchantable timber remaining upon said claim, to wit, 600,000 feet.

That thereafter and on or about the fourth day of September, 1886, the said entry was held for cancellation upon report of Special Agent M. J. Haley, then in the field in the Blackfoot Valley, and the said Edgar applied for a hearing which was postponed at the request of the same land office authorities from time to time, so much so that the said Edgar was unable by reason of such postponements to have said charges heard and disposed of, and finally in necessity and in disgust abandoned the said claim and the said claim was thereafter finally cancelled on or about the twelfth day of November, 1890. That the said Edgar was a poor man depending upon his labor for the subsistence of himself and family and could not by reason of the uncertainty as to the disposition of his said claim expend further labor and money in the development thereof, and therefore and for no other reason abandoned same. That the said land was and is first-class agricultural land and the said Edgar at all times desired and intended

in good faith to make of it a home and farm for himself and family.

Defendant avers that the said timber cut, removed and sold from said Southeast Quarter of said section was so cut, removed and sold in good faith by the said Edgar and purchased in like good faith by the said W. H. Hammond and that said timber was worth not to exceed the sum of one dollar per thousand feet.

And further in this behalf defendant avers that charges were preferred against him and against the said W. H. Hammond both civil and criminal by the Department of the Interior and the Department of Justice in the fall of 1886 and again in the fall of 1889 arising out of the matters in this paragraph hereinbefore [46] set forth, but that after a full investigation by plaintiff said charges were withdrawn and dismissed on or about the sixth day of April, 1892, and defendant relies upon said withdrawal and dismissal as a *retraxit* and abandonment of said charges by plaintiff and pleads the same in bar.

And further in this behalf defendant avers that the said W. H. Hammond was not in any sense his agent or associate in purchasing said timber from the said Edgar nor was defendant in privity therewith, or participating in, directing or controlling the cutting and removing, or cutting or removing of said timber or the manufacturing thereof into lumber.

5.

And for a further and separate defense and an-

swer to said complaint and the whole thereof, defendant avers that all of the timber which it is therein alleged was cut down, felled and removed, or cut down, felled or removed, and manufactured into lumber or manufactured into lumber, and appropriated, used, sold and converted, or appropriated, used, sold or converted by defendant, or the corporations, or either of them named in said complaint, or by any joint tort-feasor of defendant, or by anyone for whose acts defendant is responsible, was cut and removed from the public timber lands of the United States by persons then citizens and residents of the state or territory of Montana for agricultural, mining, manufacturing or domestic purposes and was actually used for such purposes and not transported out of said State or territory of Montana, and that at the time mentioned in the complaint herein there were no regulations made or prescribed by the Secretary of the Interior respecting said matter. And further in this behalf defendant avers that he was during the period of time intervening between the first day of January, 1885, and the first day of January, 1895, a citizen and resident of the State of Montana. [47]

## 6.

And for a further and separate defense and answer to said complaint the defendant avers that all the timber which it is herein alleged was cut down, felled and removed, or cut down, felled or removed, manufactured into lumber, or manufactured into lumber, and appropriated, used, sold and converted, or appropriated, used, sold and converted, or appro-

priated, used, sold or converted by defendant, or the corporations, or either of them named in said complaint, or by any joint tort-feasor of defendant, or by anyone for whose acts defendant is responsible, was cut, removed, manufactured and sold without oppression, fraud or malice against the plaintiff or anyone else, or other than in the full and firm belief that it was lawful and proper that said timber should be so cut down, removed, manufactured and sold and in this behalf defendant avers that the value of the said timber was not in excess of the sum of twenty-five cents per thousand feet board measure while standing.

WHEREFORE, defendant prays that plaintiff take nothing by its complaint herein but that defendant have judgment for his costs herein expended.

W. S. BURNETT,

Attorney for Defendant. [48]

EXHIBIT "B."

*In the District Court of the United States, Ninth Circuit, in and for the Northern District of California, Second Division.*

No. 15,130.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.



**Affidavit of W. S. Burnett in Support of Motion for  
Leave to File Amended Answer.**

State of California,

City and County of San Francisco,—ss.

W. S. BURNETT, being first duly sworn, deposes and says:

That he is and ever since the appearance of the defendant in the above-entitled action has been, sole attorney of record for the defendant herein; that he prepared the answer on file herein on or about July 14, 1911; that the matters out of which the alleged cause of action arises against defendant, set forth in the complaint herein, all transpired in the State or Territory of Montana, between the years 1885 and 1895, each inclusive, and are mostly concerned with the action of parties other than the defendant personally; that by reason of the ancientness and obscurity resulting therefrom, it was only recently and subsequent to the preparation of said original answer herein that defendant or affiant could, by the exercise of reasonable diligence, learn certain of the facts in the case necessary to a full and true answer herein, and that by reason of such facts discovered since the preparation and filing of the original answer herein, it has become necessary to file said amended answer; that the facts alleged in the amended [49] answer hereto attached, and marked Exhibit "A," are true as affiant verily believes; that the filing of said amended answer will be in furtherance of justice.

And further affiant saith not.

W. S. BURNETT.

Subscribed and sworn to before me, this 24th day of December, 1912.

[Seal] FRANK L. OWEN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Dec. 24, 1912. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [50]

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At a stated term, to wit, the November term, A. D.  
1912, of the District Court of the United States  
of America, in and for the Northern District of  
California, Second Division, held at the Court-  
room in the City and County of San Francisco,  
on Monday, the 13th day of January, in the year  
of our Lord one thousand nine hundred and thir-  
teen. Present: The Honorable WILLIAM C.  
VAN FLEET, District Judge.

No. 15,130.

UNITED STATES

vs.

A. B. HAMMOND.

**Order Granting Motion to File Amended Answer.**

By consent ordered that defendant's motion for  
leave to file amended answer be granted. [51]

*United States District Court, Northern District of  
California, Second Division.*

No. 15,130.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

**Verdict.**

We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Fifty-one Thousand and Forty (\$51,040.00) dollars.

GEORGE W. ELIASSEN,

Foreman.

[Endorsed]: Filed Feb'y 8, 1913. W. B. Maling,  
Clerk. [52]

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*In the United States District Court in and for the  
Northern District of California, Second Division*

No. 15,130.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

**Judgment on Verdict.**

This cause having come on regularly for trial upon the 14th day of January, 1913, being a day in the

November, 1912, Term of said Court, before the Court and a jury of twelve men, duly impaneled and sworn to try the issue joined herein, Frank Hall, Special Assistant to the Attorney General and Thomas H. Selvage, Assistant United States District Attorney, appearing as attorneys for the plaintiff and Charles S. Wheeler, and W. S. Burnett, Esqrs., appearing as attorneys for the defendant; and the trial having been proceeded with on the 15th, 16th, 17th, 21st, 22d, 23d, 24th, 28th, 30th and 31st days of January and the 4th, 5th, 6th, 7th and 8th days of February, all in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed, and the cause, after arguments of the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Fifty-one Thousand and Forty (\$51,040.00) Dollars. George W. Eliassen, Foreman,"—and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the [53] premises aforesaid, it is considered by the Court that the United States of America, plaintiff, do have and recover of and from A. B. Hammond, defendant, the sum of Fifty-one Thousand Forty and no/100 (\$51,040.00) Dollars, together with its costs in this behalf expended, taxed at \$1,617.49.



Judgment entered February 8, 1913.

W. B. MALING,  
Clerk.

A true copy. ATTEST:

[Seal]

W. B. MALING,  
Clerk.

[Endorsed]: Filed Feb. 8, 1913. W. B. Maling,  
Clerk. [54]

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*In the District Court of the United States for the  
Northern District of California.*

No. 15,130.

UNITED STATES

vs.

A. B. HAMMOND.

**Clerk's Certificate to Judgment-roll.**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 8th day of February, 1913.

[Seal]

W. B. MALING,  
Clerk.

[Endorsed]: Filed February 8, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [55]

*In the District Court of the United States, in and for  
the Northern District of California, Division  
No. 2.*

No. 15,130.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED, that on the trial of this cause, in this court, at the November term, 1912, thereof, the Honorable Wm. C. Van Fleet, District Judge, presiding, the plaintiff being represented by Frank Hall, Esq., Special Assistant to the Attorney General, and Thos. H. Selvage, Esq., Assistant United States Attorney, and the defendant by Chas. S. Wheeler, Esq., and W. S. Burnett, Esq., the following proceedings were had:

On Tuesday, January 14, 1913, a jury was impaneled and sworn according to law, and thereupon, upon motion of Mr. Hall, it was ordered that the complaint herein might be amended by adding to the third paragraph thereof the words "Missoula Mercantile Company and Big Blackfoot Milling Company"; and thereupon it was ordered by the court that the amended answer on file stand as an answer to the complaint as so amended and be deemed to deny the matter added to the complaint by said amendment.

Thereupon Mr. Hall made his opening statement

(Testimony of U. S. Swartz.)

on behalf [56] of the Government.

Thereupon the plaintiff, to sustain the issues upon its part, offered the evidence of the witnesses hereinafter named and the documents hereinafter set forth, as its evidence in chief, in the manner, form and substance following:

**[Testimony of U. S. Swartz, for Plaintiff.]**

U. S. SWARTZ, a witness called on behalf of the plaintiff, after being first duly sworn, testified as follows:

**Direct Examination.**

I am forty-seven years old. I reside at Missoula, Montana, and have resided there for twelve years. By occupation I am timber cruiser and land surveyor. I have been pursuing this occupation in the woods since 1880. In surveying I received my education in the common schools and one short course I took in Eau Claire, Wisconsin, in six months, just to obtain a knowledge of land surveying. I have been following the actual profession of land surveyor for about twenty-four or twenty-five years. As to the extent of my work in land surveying, it has just been in subdividing surveyed sections for the different companies I have worked for and tracking section lines. This work of land surveying I have pursued more or less every year for the companies I have worked for. I attend to the surveying for these companies. I have been engaged in scaling timber [57] about the same length of time. I am now employed by the Forest Service as a timber cruiser. In 1909 I was employed by Mr. Sharp, of the Fourth

(Testimony of U. S. Swartz.)

Field Division of the General Land Office, to cruise timber and survey lands in the Big Blackfoot Valley and in the Hellgate Valley, in Montana. Under that employment I was to run lines and to scale timber. I did not have charge of the party. Mr. Bennett had. The surveying which I did was replacing the old section lines and doing the subdivision where necessary in the sections. As to scaling of timber, I did a portion of the scaling of the stumps on the land that was designated. I used Scribner's decimal "C" rule in scaling the stumps. I prepared a special rule that was used in the scaling of the timber in question in this suit. As to the preparation of this rule, the purpose for which it was prepared and the manner it was afterwards used in scaling the timber, I would state that the rule was prepared for the reason that the trees that remained on the ground in most instances on this land were just stumps. The body of the tree or the part between the stump and the top had gone, and the top was also destroyed, so you could not find it; so to make this rule we went in the neighborhood in the same class of timber, where timber had been cut as near as we could on adjoining land, and measured the stump, the distance from the stump in the ground where the tree had laid, to the top where it had been cut off, and measured the top; then we took the measurement from the stump to the top—that is, we took the length between the stump and the top, divided that into 16 foot logs, sometimes one, two or three or four, whatever the size of the stump was; then we took and subtracted



(Testimony of U. S. Swartz.)

the diameter of the top from the measurement across the stump, taking the difference between the [58] top and the stump and divided it by the number of logs that would be in this tree, 16 foot logs; taking the answer to that and using it as a basis to scale those logs; for instance, if we had a 20 inch stump and an 8 inch top with three 16 logs between them, we would subtract the 8 from the 20, leaving 12, divide by 3, which would leave us 4 inches from the first log from the butt, 4 inches from the 20 would leave a 16 inch log, the next would be a 12 inch log, and the top would be an 8 inch log; then we took this decimal "C" rule and scaled each one of those logs. The decimal "C" rule is the established rule for timber measurements and scaling logs. We would get just as many of those 20 inch stumps as we could. We started at a 12 inch stump and went up. If we could get 20 we would get it, and if we could get 100 we would get it. They would all have different tops. When we got that we would scale each log separately. We added the whole together and divided that by the number of stumps that we had scaled and the number of trees, whether 20, 40 or 100, and that gave us an average tree, what was in an average tree of that size of stump and put that on this rule, and then when we came to where we could not find the tops, we put this rule on it, that is, we would measure the stump and the logs according to our rule and that would give us the amount, the average amount that was in that tree when it stood on that stump, according to this rule. In the practical use of this rule, I laid it

(Testimony of U. S. Swartz.)

across the top of the stump on the lands that were designated to me as the lands which I should scale, and if the stump would measure twelve inches across the top, I then calculated that there was one hundred and twenty feet, board measure, of lumber in the trees cut from that stump. This system was adopted from all rules of trespass scaling that I have had anything to do with. Where we cannot find the [59] tops, we get up a rule of this kind in order to scale those trees. From my experience as a scaler, I state that that system which I adopted is approximately accurate—as near as you can make it. It is not exactly accurate, but it is as near as you can get it. I do not know of any other system by which I might have more accurately ascertained from the measurement of the stump the amount of board measure in the tree. It is not intended to be a method whereby accurate measurements may be obtained; but just approximate measurements can be arrived at where the body of the tree has disappeared and the top as well. I did some actual scaling myself and have my notes covering my scaling. This scaling was all confined to lands that are covered in the complaint. The following are the number of stumps counted and the contents in board measure feet which I estimated as having been contained in the trees represented by said stumps, on the following described subdivisions of land, respectively:

Section 6, township 11 north, range 15 west, M. P. M., 1650 stumps; 891,360 ft., board measure. Section 20, township 11 north, range 15 west, M. P. M., 42

(Testimony of U. S. Swartz.)

stumps; 21,820 ft., board measure. Section 22, township 11 north, range 15 west, M. P. M., 1508 stumps; 1,033,590 ft., board measure. East half of the northwest quarter of section 18, township 13 north, range 14 west, M. P. M., 1,393 stumps; 714,060 ft., board measure. Northwest quarter of section 2, township 11 north, range 16 west, M. P. M., 249 stumps; 148,540 ft., board measure.

That was all that I scaled personally. On all these sections that had been surveyed, I traced the section lines and subdivided the sections where there was not a full section. Where a full section was cut over, I just traced the lines around the section; those that **were only parts of sections**, I subdivided. [60] This running out of the lines I did before doing the scaling. There were other persons scaling with me in the same party and I did the surveying for their scaling and that surveying was done in the same manner as I have indicated.

#### Cross-examination.

I have no personal knowledge of any of the timber cut and that may have been taken off of any of these sections where I made the examination, as to who did it and when it was done. In going upon the land I found stumps where there were no tops upon the ground. The tops had disappeared some by fire; some had laid there on the side hills where they had rotted and disappeared that way and several different ways; it has been a long time and some had rotted away entirely, so that time had obliterated the tops, and I took the method that I did in



(Testimony of U. S. Swartz.)

order to get the nearest approximation to it that I could under the circumstances. I got merely an average approximation. Where there were no tops lying upon the ground, I found some tops in adjacent property; but I did not go outside of a mile, as I recollect it, from some part of the cutting. I examined the trees that had been cut and made an approximation from trees perhaps not outside of a mile from where these trees that I subsequently estimated had formerly stood. Then from that approximation I averaged the stumps on that property a mile away. Of course, where we could find a top on that property we measured that way. I knew of my own knowledge who cut some of the trees on the adjoining property, but not on the property in question.

#### Redirect Examination.

When I came to scale the stumps on any particular section I did not count and scale all the stumps that I found [61] upon that section. The only stumps that I did not scale and count were those that I knew had been cut in recent years. I had been in that country and had known of other cuttings subsequent to the time that it is alleged that the cuttings in controversy had taken place. On sections 6 and 8, township 11 north, range 15 west, I found cuttings that I did not scale. I did not scale those cuttings on said section 6 because they had been cut at a time after I came to the country—after the alleged cuttings in this case. I could see a difference in the physical characteristics between



(Testimony of Dan Graham.)

the stumps that I counted and the stumps that I did not count. The difference between those stumps was in the age, by the way they were decomposed and rotted—the stumps were rotten, portions of them.

**[Testimony of Dan Graham, for Plaintiff.]**

DAN GRAHAM, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

**Direct Examination.**

I reside at Missoula, Montana. I have been in the timber business pretty near all my life, and the character of the work I have done in the timber business has been pretty near everything. I have cruised and have been a foreman in the woods—timber cruiser, staging and working at everything; drove team, loaded logs. I have lived in the State of Montana since the fall of 1889. Prior to coming to Montana, I had experience in lumber business for several years in Minnesota and the State of Maine. Since I came to the State of Montana, I have been engaged in very little other work than the lumber business. I am acquainted with the country known as the Hellgate Canyon Valley; I first visited it in 1889. There was a lumber mill operating a short distance east of Bonita, on [62] the river, at that time. It was locally known around there as the Missoula Mercantile Company's or Hammond Mill. There was no other mill during that season that I know of, that logs which were being cut at that time in the vicinity of Tyler Creek by Henratty and Tillman could have been going to that season. I re-

(Testimony of Dan Graham.)

mained in the vicinity of Hellgate Canyon and the Bonita Mill from the fall of 1889 until the following summer. Since that time to the present time I have been back and forth over that country so many times that I cannot keep track of it now. I know the whole country. I have been familiar with the sawmills that have operated in Hellgate Canyon, in the vicinity of Bonita, beginning with 1889 until the present time. I never was employed at the Bonita Mill, situated on section 14. I was employed by the Government in 1909 to do scaling in connection with some of the lands involved in this case.

Q. About how long had you been scaling in the vicinity of the town of Missoula, timber of the same kind and character as the timber that was scaled by you in this case?

A. I think I was working three summers right in that vicinity.

(Witness Continuing:) After that I was working in other places for L. L. Sharp, who was chief of the Field Division for the Government.

Q. Outside of your work for the Government, how long had you been scaling timber of this kind and character in the vicinity of these lands?

A. I had done some scaling of logs, but none of stumps.

(Witness Continuing:) Mr. Bennett had charge of the outfit in connection [63] with which I did the scaling in this case. Mr. Swartz located the lands as to the sections and fractional parts of sections that I was to scale. The method as to which

(Testimony of Dan Graham.)

I should conduct my scaling was gone over in the office at Helena and Mr. Swartz, Mr. Bennett and Mr. Sharp agreed upon this scaling. I used a Scribner decimal "C" rule in my scaling and I made notes in the field of the scaling. The figures are my own figures and the computations and multiplications are my own. The following are the number of stumps counted and the contents in board measure feet which I estimated as having been contained in the trees represented by said stumps, on the following described subdivisions of land, respectively:

Section 8, township 11 north, range 15 west, M. P. M., 1622 stumps; 896,000 ft., board measure. Section 18, township 11 north, range 15 west, M. P. M., 183 stumps; 69,510 ft., board measure. West half of section 26, township 11 north, range 15 west, M. P. M., 540 stumps; 349,470 ft., board measure. Section 10, township 11 north, range 16 west, M. P. M., 1206 stumps; 722,640 ft., board measure. Section 12, township 11 north, range 16 west, M. P. M., 1029 stumps; 707,120 ft., board measure. South half of section 14; township 11 north, range 16 west, M. P. M., 1068 stumps; 954,510 ft., board measure. West half of the northwest quarter of section 18, township 13 north, range 14 west, M. P. M., 1553 stumps; 993,360 ft., board measure. In the south half of section 18, township 14 north, range 15 west, M. P. M., [64] the following:

Lot 7,—411 stumps; 273,840 ft., board measure. Lot 8,—319 stumps, 186,530 ft., board measure. Lot 9,—294 stumps; 161,340 ft. board measure. Lot



(Testimony of Dan Graham.)

10,—408 stumps; 193,390 ft., board measure. Lot 11,—499 stumps; 268,520 ft., board measure. Lot 12,—797 stumps; 395,980 ft., board measure.

Northwest quarter of section 34, township 14 north, range 14 west, M. P. M., 2,486 stumps; 1,600,280 ft., board measure. North of the river on section 28, township 14 north, range 16 west, M. P. M., 972 stumps; 566,080 ft., board measure, being a fractional part of the section. I don't know how many acres there were there that I scaled.

Mr. HALL.—The record may show that the Government desires to eliminate from this suit all of the timber that was cut off on the south half of the south half, and the north half of the southeast quarter, and the west half of the northeast quarter of section 22, township 14 north, range 14 west, M. P. M. We only claim that we are entitled to recover for the timber cut from the east half of the northeast quarter of section 22.

(Witness Continuing:) I rescaled the said east half of the northeast quarter. In the north forty acres of the tract last mentioned I counted 24 stumps, estimating the contents at 20,790 ft., board measure; in the south forty acres of said tract last mentioned, I counted 504 stumps, estimated at 335,900 ft., board measure, or a total of 528 stumps and 356,690 ft. board measure, for the said east half of the northeast quarter of section 22, township 14 north, range 14 west, M. P. M.

Wednesday, January 15, 1913. [65]

Q. In the scaling you did in the Hellgate country,



(Testimony of Dan Graham.)

did you eliminate from your scaling or your count of stumps any particular class of stumps?

A. Yes, there was quite a difference in the rotting of the stumps and the soundest stumps I cut out.

(Witness Continuing:) I knew of a lot of cutting that was done there in the Hellgate country subsequent to the year 1894, and in my scaling in the Hellgate country, I excluded, in making my scaling, cuttings I knew to be subsequent to 1894. I excluded some on section 26, township 11 north, range 15 west, and there were some stumps on section 18, township 11 north, range 15 west, that I did not include in my scaling. In my rescaling of the south half of section 18, township 14 north, range 15 west, I made an examination of the stumps found on the different portions of the section having regard to the different times at which those trees may have been cut. On lots 11 and 12, the stumps were more rotten there than they were on the other portion. There was also more second growth, that is, young trees, that come up, more on that part of the ground than they had on the other. It was also cut cleaner than the other portions of the south half of 18. These lots, 11 and 12, are in the southeast corner of the section. The common name applied to the land embraced in the southeast corner of said section 18 was the Tuchenhausen claim—Tuchenhausen was the name of the man who located it. I found on this section 18 that the older cutting had taken place on lots 11 and 12—that is, the Tuchenhausen claim. By older cutting I mean that on which the stumps were

(Testimony of Dan Graham.)

more rotten and upon which more second growth—  
young timber—had come up. [66]

Q. From your experience as a scaler of timber,  
can you judge from what you observed on section  
18 there, which portion of the section had been cut  
first?

To which question defendant objected on the  
ground that it was incompetent, irrelevant and im-  
material.

Thereupon the Court overruled said objection; to  
which ruling the Court defendant duly excepted.

**Defendant's Exception No. 1-A.**

A. On the southeast quarter of these lots.

Q. From your experience, can you tell the time  
that had elapsed between the first cutting and the  
second cutting?

To which question defendant objected on the  
ground that it was incompetent, irrelevant and im-  
material.

Thereupon the Court overruled said objection; to  
which ruling of the Court defendant duly excepted.

**Defendant's Exception No. 1-B.**

A. Well, in my judgment, it would be somewhere  
about five or six years.

(Witness Continuing:) I have been along the  
Hellgate River from the year 1889 until the present  
time a good deal of the time, and during that time  
have learned the names that are locally used in the  
Hellgate Canyon in designating gulches, canyons  
and streams. I know the gulch called the Cramer  
Gulch. It was located in sections 2 and 10, town-

(Testimony of William Greene.)

ship 11 north, range 16 west, M. P. M. Rich's Gulch, with which I am familiar, is located in sections 6 and 7, township 11 north, range 15 west, M. P. M. Strong's Gulch is in sections 2 and 8, township 11 north, range 15 west, M. P. M. Medicine Tree Hill is in section 22 and extends into section 23, township 11 north, range 15 west, M. P. M. Beaver Tail Hill is in sections 2 and 10, township 11 north, [67] range 16 west, M. P. M., and Tyler Gulch is in sections 26 and 23, township 11 north, range 15 west, M. P. M. There was no mill below any of the lands I have spoken of in the fall of 1889, except the Bonita Mill. It was locally known as the Bonita Mill and the Missoula Mercantile Company's Mill or the Hammond Mill. The summer of 1890 was the first year that I went to the Bonita Mill. I did not meet Mr. Fenwick there.

#### Cross-examination.

As to whether or not G. W. Fenwick was the owner of the Bonita Mill at the time of my arrival there, I know nothing about that. For all that I know, the mill might have belonged to any man. I don't know anything about it. The process by which I made my count was by measuring each stump with this rule and then I put a piece of bark or a chip or a rock or something on it to know that was the one I had scaled, so that I would not scale it again. Coppering is what we call it. I don't suppose I counted every stump. I did not count any one stump twice. I would say that the number of stumps that I counted were all within the lands that



(Testimony of Dan Graham.)

I knew to be Government lands. I have had experience in the woods and I know there are a great many trees that are thrown down that are not sound and have proved to be rotten after they are thrown down.

Q. Now, then, in the method of count that you took, where the tops had disappeared or rotted away and removed the remains, or where fire had swept over and taken it out, you would not know but that some of the stumps that you counted had belonged to a tree that had been rotted away, would you?

A. Well, if there was anything there to indicate it, we cut it out. I cut it out anyway. [68]

Q. But if there was anything there, you measured it?

A. Well, if the stump was there, I measured the stump.

Q. You measured it notwithstanding the fact that it may have belonged to a rotten tree from which a foot of log had never been taken?

A. If there was anything there to show it, that it was a rotten tree, I would cut it out.

Q. Very often ten or fifteen feet up a tree the rot begins? A. Yes, sometimes it does.

(Witness Continuing:) My method of making the measurements of the logs was the same as that testified to by Mr. Swartz. I assisted him in making the measurements that went to make up that rule.

Q. Did you go on any of these lands that are here involved and make any measurements, or did you



(Testimony of Dan Graham.)

take your measurements from the lands not here involved?

A. We took some on 14-11-16, that I know of, and we took some on section 35-12-16, that would be just up north of section 2, adjoining section 2 in the next township north. It was hard to find trees that had the tops left in that country. We had to make our rule up from measurements taken from trees where we could find the tops. If a tree is cut on a side hill, the top will sometimes go a quarter of a mile away. That is, when the tree is felled, it will roll down the hill and we had to go on level ground.

Q. Mr. Swartz made the computations and gave you the average, and from that average you made your calculations here? [69] A. Yes.

Thereupon defendant moved to strike out the testimony of the witness and conclusions made by him, upon the ground that they are hearsay, irrelevant, incompetent and immaterial; which motion was denied by the Court; to which ruling of the Court defendant duly excepted.

#### **Defendant's Exception No. 1-C.**

(Witness Continuing:) In making my count, I measured all of the stumps except those that were destroyed by fire or that were decayed. I did not measure those. That part of the stump that remained, I measured by placing my rule across the top of the stump and measuring from one edge to the other, and I made no measurement in any instance where the stump was so far gone that there was not a sufficient basis to make a measurement.

(Testimony of Dan Graham.)

Redirect Examination.

A stump usually rots on the outside if it has been a sound tree. There are instances when a stump will decay from the middle or the heart. When a stump rots, there will be a shell on the outside that stands up and then there will be a rotting inside for an inch or two, and it might rot from there in. That shell will stand up there, and unless it is destroyed by fire, will stand up there for quite a long time. That is by reason of the harder character of the outside of the shell, and the shell remaining there is indicative of the size of the tree that had stood there. [70]

**[Testimony of William Greene, for Plaintiff.]**

WILLIAM GREENE, a witness called on behalf of plaintiff, on the said 15th day of January, 1913, being first duly sworn, testified as follows:

Direct Examination.

I am a lumberman, residing at Missoula, Montana, and have been engaged in this business pretty near all my life. I have done scaling. I was employed by the United States Government to do scaling in the vicinity of the Hellgate Canyon country and the Big Blackfoot River country. It was in 1909. Mr. Graham and Mr. Swartz were associated with me in doing this scaling. It was under the direction and supervision of Mr. Bennett. In scaling I used a rule similar to the one testified to by Mr. Swartz and Mr. Graham, and used it in the same manner. The following are the number of stumps counted and the contents in board measure feet which I estimated

(Testimony of William Greene.)

as having been contained in the trees represented by said stumps, on the following described subdivisions of land, respectively:

East half of section 26, township 11 north, range 15 west, M. P. M., 142 stumps; 93,160 ft., board measure. Section 2, township 11 north, range 16 west, M. P. M., 3,436 stumps; 1,714,100 ft., board measure. North half of section 14, township 11 north, range 16 west, M. P. M., 1,779 stumps; 682,080 ft., board measure. Southeast quarter of section 28, townships 14 north, range 14 west, M. P. M., 2,620 stumps; 1,557,025 ft., board measure. South half of section 20, township 14 north, range 15 west, M. P. M., 1,801 stumps; 469,750 ft., board measure. North half of the northeast quarter of section 26, township 14 north, range 16 west, M. P. M., 414 stumps; 199,960 ft., board measure. [71] I was employed in logging in the vicinity of the Bonita Mill. I think it was in 1889 that I first commenced my employment there. I was employed by Mr. Fenwick. My duties were to drive team. I do not know what section or description of land any timber was taken from that time; but I do know some places which were designated by local names from which timber was taken at that time. The first timber was taken in the Cramer Gulch. I drove a team there. I worked there about three weeks and then I went into the yard and then I went to the mill and went to work. As to the season of the year when I worked in the timber in Cramer Gulch, it was when we got it out on sleds. I do not



(Testimony of William Greene.)

know how much approximately was taken out of the gulch at that time; but the logs went to the Bonita Mill. I worked in the yard at the Bonita Mill the majority of that winter. After the winter's work was finished, I went on the trucks, trucking work—this was across the river from the mill—what they now call 14. The logs that I had been working on were cut in the spring of 1890. The logs went to the Bonita Mill. The logs were taken from section 14. I continued working in and about the Bonita Mill about a year and a half. While I was working at the Bonita Mill, I was paid by means of a bank check. Most of my checks I cashed in Bonita at W. A. Cook's. I know of no other land from which logs were taken to the Bonita Mill, only from section 14 and out of Cramer Gulch.

I worked in the Big Blackfoot country commencing in 1887 and was employed to work in that country by Mr. A. B. Hammond. My immediate superior in the woods was Cunningham. He was the general manager. The camp was located at Fish Creek and was known as Headquarters Camp. Cunningham was in charge [72] at that time. At that time we were not doing any logging. We were building a bridge across the Blackfoot River. We had to build that bridge first. I worked somewhere about three weeks on that, and when it was completed I went down to Cannas Prairie and worked for Pat Hayes, who was logging. That was in the year 1887. I remained at Pat Hayes' camp all winter and until the spring. I could not say from what lands he was



(Testimony of William Greene.)

logging at that time. Pat Hayes was supposed to be logging for the man I was working for. I don't know, but that is what I supposed, and that was Mr. A. B. Hammond. He was the man I was employed by. I think it was George Hammond, my walking boss, who directed me to work for Pat Hayes, and I remained with Hayes from the fall until the spring, which brings me to the spring of 1888, and I helped to drive logs that spring. The logs went to the Bonner Mill. There was no other mill that I know of at Bonner except the mill controlled and known as the Hammond Mill, and there was no other mill at that time to which these logs could have been driven. After I finished the drive in 1888, I went back to Blackfoot again, and was stationed at Headquarters Camp—Fish Creek Camp, and I was working in the woods—putting logs into the Clear Water until the next drive started. I was working there out of Fish Creek Camp. The drive started somewhere the latter end of June or the first of May. It was after the highwater got over. I drove the logs down the river within two miles of Bonner. The logs went to Bonner. My next work, I went back to Fish Creek Camp and worked that summer skidding logs. The locality from which these logs were skidded was commonly known as down near what we call the Sontag Ranch, back of the Sontag Ranch. That was in 1888. The Sontag Ranch was located [73] on Section 22. I think it was east of the Sontag Ranch house that the logs were cut. My next work was for a man named McLaughlin, on the Clear Water, on what is called

(Testimony of William Greene.)

Blanchard Creek. I worked there all that winter until the spring.

Mr. HALL.—I understand from what this witness has told me and what the other witnesses have told me, that the Government has no right to recover for the southeast quarter of section 8, township 14 north, range 14 west.

Mr. WHEELER.—That is one of the places where we have been charged with having cut lumber. Will you admit that there never has been any timber cut on there?

Mr. HALL.—No; you have cut that quarter section; also the northwest quarter of section 2 in the same township and range.

The COURT.—You say now that you abandon any right to recover on this quarter section of 8?

Mr. HALL.—Yes; on the southeast quarter of section 8; and also on the northwest quarter of section 2.

Mr. WHEELER.—In order to save me from going into proof in regard to the northwest quarter of section 2, will you now admit at this time, that on the northwest quarter of section 2 there has never been cut any timber?

Mr. HALL.—I can swear to that personally myself.

(Witness Continuing:) After I finished my work for Mr. McLaughlin, I drove out of the Clear Water in the spring of 1889 for these same people. The drive went to Bonner. This terminated my work in the Blackfoot country and I never went back there after that. While working on the Blackfoot, I was paid for [74] my services during all the time I

(Testimony of William Greene.)

was there by receiving a time check on a concern supposed to be the Missoula Mercantile Company. It was paid by the Missoula Mercantile Company in its office in Missoula. Mr. John Keith had charge of the adjustment of the payment of my time checks.

Concerning the Bonita cutting, the lands that I worked on in the vicinity of the Bonita Mill, I recognized as the same lands at the time I did scaling for the Government. I knew the country.

Cross-examination.

When I first went to work in and about the Bonita Mill, I think in 1889, Mr. Fenwick and Mr. Graham were the only two men I knew there running that business. I don't recollect of ever seeing Mr. A. B. Hammond there. I don't recollect that I ever saw Mr. Fred Hammond there. He may have been there and it slipped my memory. I could not say.

Q. What was Mr. Fenwick's duty there?

Ans. It appeared as though he owned that saw-mill.

(Witness Continuing:) The man who employed me first in the woods there was Mr. Graham, and he seemed to be the man who was superintending the business for Mr. Fenwick. I understood Graham to be the manager, general manager, around there. When I was paid, I got a bank check and I cashed it at Cook's saloon, about a mile or a mile and a quarter from the mill. Mr. Graham handed the check to me sometimes, and they had a bookkeeper up there by the name of Fowler and he gave it to me sometimes. There was a small store at the mill and there



(Testimony of William Greene.)

was a man in charge selling the goods. Mr. Graham seemed to be the head man. Mr. Fenwick was pretty much around there all the time in 1889. [75]

When I was employed in the Blackfoot country, Mr. A. B. Hammond hired me right in Missoula. At the time he hired me it was on the sidewalk in Missoula. Missoula is some twenty-six or twenty-eight miles away from the Hellgate country and seven miles away from the Bonner Mill. When I was employed by Mr. A. B. Hammond, I went up to him and asked him if he wanted any more men in the woods, up at the camp; he said he did and he took my name down and I went up and went to work. He told me to go to Headquarters Camp. That was the Fish Creek at that time. I don't recollect ever seeing Mr. W. H. Hammond up there in the woods. I saw him at Bonner at the mill that cut the logs that I was working on. I don't know whether W. H. Hammond owned the mill or not. I could not say of my own knowledge whether A. B. Hammond owned the mill or not; nor do I know whether the Blackfoot Milling and Manufacturing Company owned it. I don't know who owned the mill. I just know who I worked for. That is all. When I went up into the woods I did not know the particular work I was hired for. I had not been hired for any particular work. I was merely told that men were needed. I knew the rates of wages that were paid to men in different lines of employment. I had been a teamster at times and also a logger. Teamsters usually got \$40.00 or \$45.00 a month, and the other men that were supposed to be



(Testimony of William Greene.)

mill swampers and cant-hook men, got \$35.00 or \$40.00 a month, just according to the men.

Q. You did not know what you were going to get when you left Missoula and reached Fish Creek, or Headquarters Camp?

Ans. I was told after I got there that I would only get \$35.00 a month, but when I was up there for a while they [76] put me driving team and then I got \$40.00 a month.

(Witness Continuing:) Mr. A. B. Hammond did not tell me at what rate I was employed—did not tell me whether I should drive a team or work with an ax. I learned what work I was to do when I got up there and what wages I would receive, from John Cunningham, who was the foreman.

The COURT.—Did Cunningham know that you were sent up there by Mr. Hammond—did he give you a note or anything of the kind?

Ans. No, sir; there was a whole crew of us went up there to go to work. They were just starting a new camp and they needed men to work.

Mr. WHEELER.—You heard that men were wanted and you went to get the job?

Ans. I went there to see him; yes, sir. We had no particular conversation. I said in substance: "Do you want any more men to go up in the woods?" And he said, "Yes," and put my name down. Nobody told me to go to Bonner. I knew the road up there and which way to go. George Hammond was supposed to be the walking boss for the Blackfoot outfit and he was along with us at that time. He took

(Testimony of William Greene.)

us up. We went up along with him and it was George Hammond who told me to go to the Fish Creek Camp headquarters. After I got through with one job I would be out of work for just a little while. I would move from one camp to another. When I was ordered off one job I would have to be hired again for another job. The foreman that was running the camp was the one that put me to work at the different places where I worked. I have heard of the Blackfoot Milling and Manufacturing Company. I could [77] not say that I ever heard that that company at that time was concerned with any of these outfits. The Missoula Mercantile Company was all I ever heard the outfit called as the owner at that time. I heard mention made of the Montana Improvement Company, but that is all. I don't know anything about it; and I also heard, in the same way, of the Blackfoot Milling and Manufacturing Company. I also heard of W. H. Hammond being in charge of the Bonner Mill. I had heard of the Blackfoot Milling and Manufacturing Company before I went up there on this first occasion. But I knew nothing about it any more than I heard of it. While I was working over on the Blackfoot I don't recollect that I ever saw A. B. Hammond there. While I was working on the Blackfoot in the different occupations that I have testified to and where I sawed or helped take logs or timber from any land. I did not know to whom any of that land belonged; I don't know whether it was railroad land or land privately owned by individuals or Government land.

(Testimony of William Greene.)

Redirect Examination.

As to going from the State of Minnesota to the State of Montana, Mr. Thomas Hathaway was in the State of Minnesota, at Stillwater, and he got me to come out to Montana.

**[Testimony of R. K. McLaughlin, for Plaintiff.]**

R. K. McLAUGHLIN, a witness called on behalf of plaintiff on the said 15th day of January, 1913, being first duly sworn, testified as follows:

Direct Examination.

I reside in Idaho and am engaged in mining. I first went to the State of Montana about the year 1880, and after I went there I engaged in the lumber business, practically. I was driving teams and engaged in other branches of it. I was employed in lumbering in the Blackfoot River country. I was [78] working at the time for George Hammond, and as near as I can recollect, at the Blackfoot he was the foreman. The first place I worked when George Hammond was foreman was on the Blackfoot River, at Headquarters Camp. I would not be positive as to the year I commenced work there. George Hammond was in charge when I went there. The camp had been in existence about one year, as near as I can remember. The first year while I was working at Headquarters Camp I hauled in some supplies. The second season I was there, I drove team from the Headquarters Camp. I was hauling logs. The first season I hauled these logs from sec-



(Testimony of R. K. McLaughlin.)

tion 27—Robert Moore was the foreman. I don't know the range.

Mr. WHEELER.—Just to clear that up, we will admit that is a part of the railroad land in the Blackfoot country, if counsel desires the admission.

Mr. HALL.—Yes.

(Witness Continuing:) It has been so long since I have been there, I would not be positive whether at any time while I was employed at Headquarters Camp I hauled any logs from the land that I knew as the Edgar claim—but it was in that direction. I have been on the Edgar claim—was acquainted with it. It was located south, as near as I can remember, from the Fish Creek Camp, or Headquarters Camp—somewhere in the neighborhood of a mile, or inside of that. As to whether at any time while I was working in Headquarters Camp I hauled logs from lands adjacent to the Edgar claim, I would not be positive without going over the ground. I think along in 1888 I built camps on Clearwater Creek; that was on section 5. I left the Blackfoot country the spring following the time I built McLaughlin Camp, and I [79] never returned after that period to work for these people, who were conducting these lumbering operations in the Blackfoot. During the time I was working in the timber up the Blackfoot, I was paid by what is called the “M. M. Store,” that is the Missoula Mercantile Company at the present time. During the time I was working there I did not have any conversation with A. B. Hammond in regard to the work when I was in the woods. Once in a while



(Testimony of R. K. McLaughlin.)

we would have some talk, but practically my business was all done with Henry Hammond and George, but we had a little conversation. I could not remember what those conversations were and when they were had, it has been so long ago. I know I can remember having a talk with the man, but it has been so many years ago, I would not like to say in regard to it I had a conversation with Mr. Hammond in Missoula in regard to some horses. I was sent down with some horses from the Blackfoot River by George Hammond, and they were placed in Mr. A. B. Hammond's barns. Those horses were there for sale. Mr. Hammond knew I brought the horses down there and told me to fix the horses up, that they were for sale, and to get them in shape, and then put them on the market for sale. They were sold that spring. The horses came from Headquarters Camp. They had been used in the Blackfoot River for logging purposes. They assisted in the drive while I was logging up the Blackfoot. The logs that I drove down the river went to the Blackfoot Mill. At that time there was no other mill than the Bonner Mill situated on the Blackfoot River.

#### Cross-examination.

I saw Mr. A. B. Hammond in the woods on the Blackfoot. I would not want to make an affidavit as to the time I saw him. The circumstances were such that I should judge that he was just [80] up there on a general inspection.

Q. Did you notice where he went?

(Testimony of R. K. McLaughlin.)

Ans. Well, that was the only time I ever saw him drive up to the camp where I was working.

(Witness Continuing:) That was while they were working there at Clearwater Camp, on section 5. Mr. A. B. Hammond did not tell me to go into the woods, or where to log, or where to haul, Henry Hammond was in charge of the mill on the Blackfoot, which was known by the name of the Blackfoot Milling Company. I testified that the Headquarters Camp had been running somewhere in the neighborhood of a year before I went there, but I would not be certain. I had never been there before this first trip, when I entered into the employment of the man who was running that camp. I do not know of my own knowledge that I had been there a year. I cannot definitely remember the year that I first went up the Blackfoot. I have drifted out of the lumber business and am in the mining business, and I tried to forget it as soon as I practically could. I remember the Edgar claim. Mr. Edgar lived on the claim and his wife was all the family he had. When I was there I noticed his improvements in the place. He had a small barn and he had built the camp where he and his wife lived, a nice comfortable little place built of logs. There was snow over the ground when I saw it, so I did not notice his vegetable garden or truck garden, if he had one. I don't remember noticing an enclosure fence there at the time.

Q. You say that you were paid by the Missoula Mercantile store, commonly called by you the "M. M. store." Tell us just exactly how that was done,

(Testimony of R. K. McLaughlin.)

what did you get in the [81] way of a paper or a time check?

Ans. No, my time was all forwarded there.

Q. Did you have any paper at all from the Blackfoot Company?

Ans. No, sir; I never got any time when I was in the Blackfoot River country, to my recollection. Everything was forwarded to Missoula.

(Witness Continuing:) When I went to Missoula and to the Missoula Mercantile Company's store there, John Keith was the man I asked for, in order to get my money. I do not remember signing any papers, any receipts, when I got my money. They gave me my money, and I did not get any papers. While I say that my time was sent to the store, I never saw in what form it was sent. I do not know anything with reference to the arrangements between the corporation called the Missoula Mercantile Company and the Blackfoot Milling and Manufacturing Company. I don't know whether they were connected in any way at all or not. So far as I know, they may have been separate corporations, with a business arrangement between them whereby the Missoula Mercantile Company would pay the time checks or the time of the Blackfoot Milling and Manufacturing Company. We are not supposed to know all about those things.

Q. Do you know whether or not it was the Blackfoot Milling and Manufacturing Company which was operating in the woods there, or Mr. Henry Hammond under a lease from the Blackfoot Milling and



(Testimony of R. K. McLaughlin.)

Manufacturing Company?

Ans. I don't know whether Henry Hammond had a lease at that time or not.

Q. At one time you did understand that Henry [82] Hammond had a lease, didn't you?

Ans. Not when I was there.

Q. You did understand at some time that he had leased that property?

Ans. I have heard that; yes.

(Witness Continuing:) I never saw any papers while I was there. I never saw my time papers.

Redirect Examination.

It was A. B. Hammond told me the price at which these horses that were sent in from the Blackfoot country were to be sold.

Recross-examination.

Regarding this horse transaction, I came to take these horses into Missoula because I was ordered to do so by George Hammond. To the best of my knowledge they belonged to the Blackfoot Milling Company at the time I started with them for Missoula. My impression was that that Company owned them. All the stock and everything that had been used practically belonged to them. They did not hire no horses at that time. My understanding was that the Blackfoot Milling and Manufacturing Company at that time owned everything that was on the river; but it was a matter of opinion and not a matter that is within my own knowledge. It was my opinion that the stable I put the horses in when I went over to Missoula was owned by A. B. Hammond. I could



(Testimony of R. K. McLaughlin.)

not say positively whether it was his private barn or not, or was something that was used by the Missoula Mercantile Company; but it was used for those purposes. It was a barn that would [83] hold maybe a dozen horses. It was close to his residence. I do not know who had the actual title to the barn. It was George Hammond ordered me to put them in that barn. My talk with Mr. A. B. Hammond about the horses was to the effect that I was to put the horses in the barn there and was to clean them up and take care of them and get them ready for sale. A. B. Hammond told me the price of the horses. He set the prices on the horses. I do not remember what price was set on them. That is over twenty years ago. I do not know who A. B. Hammond was acting for, whether it was for himself individually or for the Company, or for Henry Hammond.

#### Redirect Examination.

Mr. A. B. Hammond told me I had better go over and stop at the Florence Hotel, instead of at the Rankin Hotel, across from the Mercantile Company, because it would be handier there when they would want me. As near as I can remember, that is the words he used.

**[Testimony of Sidney C. Mitchell, for Plaintiff.]**

SIDNEY C. MITCHELL, a witness called on behalf of plaintiff on the said 15th day of January, 1913, after being first duly sworn, testified as follows:

#### Direct Examination.

I reside at Oroville, Washington, and am a retail

(Testimony of Sidney C. Mitchell.)

lumber merchant. Once I resided in the State of Montana. I was working at Wallace at that time for the Eddy-Hammond Company. Mr. A. B. Hammond employed me to work at Wallace for the Eddy-Hammond Company. I commenced work for them about June 17. My duties were to keep the time and take care of the commissary, and small store supplying to sawmills. One sawmill was located at Wallace and one about a mile and a half west of Wallace. I [84] remained at Wallace in this employment until about the middle of December. Then I went to Missoula. I never worked for the Eddy-Hammond Company or the Missoula Mercantile Company afterwards. I was at one time employed about the Bonita Mill. I first commenced to work there about May or June of the following year, 1886. I was working there as a laborer. Mr. Fenwick hired me to work at the Bonita Mill and I continued working there as a laborer until about August 1st. My duties were running the slab car and edging car. Part of the time I was in the cook-house. At that time I did not know from what lands the logs that were being sawed had been taken. After I ceased to be employed as a common laborer at the Bonita Mill, about the first of the year, 1887, I went to work again at the Bonita Mill as a flunkey, working in the boarding-house. In the spring of that year, Mr. Fenwick gave me the commissary to look out for and some sealing work to do. The accounts that I had charge of were kept in what you would call a single entry ledger work, single entry bookkeeping. The commis-

(Testimony of Sidney C. Mitchell.)

sary accounts that I kept were not, and no other accounts that I kept were transmitted to any other person or concern. They were not transferred. I was not familiar with the keeping of the lumber accounts during the time I was there. I used to make a statement of the shipments and forward that to the Missoula office. I am not clear as to whether I made those statements of the shipments or whether Mr. Fenwick made them, but I am under the impression that I made those and mailed them myself. They were mailed to the Missoula Mercantile Company. We are speaking of the year 1887. I continued to transmit these shipment statements to the Missoula Mercantile Company until I quit, about December [85] 1st. I was let out. Later, about 1890 or 1891, I went back to work at the Bonita Mill again. I was there just about two or three weeks. Mr. William Graham was in charge and they wanted me fix them up some books. I do not remember who directed that I should go up there and fix up those books. I was not working anywhere when I was sent up there. I think Mr. Graham hired me in Missoula to go up and fix them up for a short time. As to the character of the books that I fixed up for Mr. Graham, they were just an ordinary small set of books to keep track of the mill employees, the commissary bills and the record of lumber shipments. I do not know how the lumber shipment records were kept after I fixed up those books or during the time I was fixing them up. I never saw the book any more after that. I do not remember whether during the time



(Testimony of Sidney C. Mitchell.)

I was there fixing up the books, that is, two or three weeks, there was any record made of the shipments then.

I was employed at the Bonner Mill, commencing work in the fall of 1886.

Q. Who employed you?

Ans. Henry Hammond; no, I have forgotten who sent me up there. I was sent up from Missoula, but I have forgotten who sent me up. Mr. Henry Hammond, I think.

(Witness continuing :) He was in charge of the mill and fixed the compensation and put me to work as a flunkey. At that time I did not have charge of any of the books at the Bonner Mill, but I did later on, that is to say, I did not have charge, I was a book-keeper there. That was in the spring of 1889. I know that shipments of lumber were made from the Bonner Mill. In 1889 I believe shipments were made in the name of W. H. Hammond [86] Hammond & Company. The invoices were made regularly at the mill, if I remember right, and forwarded to the Missoula Mercantile Company, to the lumber office. I don't remember how it was carried on now, but they were sent to Missoula and the lumber office in Missoula distributed the invoices. This lumber office was in the office of the Missoula Mercantile Company. I was employed in the office, in the lumber department of the Missoula Mercantile Company from the fall of 1887 until sometime in January, I think about the 20th of January, 1888. From the time I left Mr. Fenwick at Bonita, until sometime in January, 1888.



(Testimony of Sidney C. Mitchell.)

It was in December and a part of January. I was an assistant in the office of Mr. Winstanley. He had charge of that office; it was located in the office of the store of the Missoula Mercantile Company—the same room. I do not know what relation existed between that business about which I was employed and the Missoula Mercantile Company. My duties were to check up the shipments of accounts that came in with invoices for the lumber shipments and to credit them up to the different sawmills and take care of the different mill company's books that were handled through the department. I do not know if that was a department of the Missoula Mercantile Company. I don't remember any shipments from the Bonita Mill handled in that department during December, 1887, and January, 1888, but there was some from the Blackfoot Mill, that is, the Bonner Mill. I remained at the Bonner Mill until sometime during the year 1890, and after I quit the Bonner Mill I went to the E. F. Rutherford Lumber Yard in Missoula. I don't remember if that was the name of it or not, but I think it was. I do not know who owned it. Dan Ross was [87] in charge of it. In that lumber-yard we received shipments of lumber from the Bonner, but not the Bonita Mill. I do not know whether or not the lumber-yard that I was employed in then accounted to the Missoula Mercantile Company for the lumber it sold at retail.

Q. To whom were those accounts rendered, if any-one?

Ans. Well, I never saw any of the Hammonds

(Testimony of Sidney C. Mitchell.)

there except Mr. Henry Hammond. I never had anything to do with him. Everything was done with Mr. Ross.

(Witness Continuing:) Going back to the first time that I went up to the Bonita Mill, in 1885, Mr. Fred Hammond was in charge of it at that time. Mr. Kenneth Ross was there. I understood his duties to be the logging foreman, in charge of the woods.

Q. From whom did you receive your directions about your work in 1885, at the Bonita Mill?

Ans. Mr. Henry Hammond sent me up there to fix up his commissary books and help out Mr. Fowler.

(Witness Continuing:) I do not remember just now of having received any instructions from Fred A. Hammond. I did not know anything of a corporation known as the Montana Improvement Company. I don't know who the officers of that Company were or are. The Montana Improvement Company, I do not know anything about it.

Q. During these years you were employed at the Bonner and Bonita Mills, where were you paid and in what manner?

Ans. Well, at the Wallace Mill we were paid with an [88] order on the store—the Missoula Mercantile Company.

Q. Go on and tell just what took place.

Ans. I think that was continued, that form was continued right along. I am not very positive about that now. I know that in 1885, when I went there, we were paid on an order. It was not a time check. It was an order for pay on the store, and they were

(Testimony of Sidney C. Mitchell.)

marked "Not Transferable." I am not sure as to how long that continued. Whether it continued right along or not, or whether they issued **bank** checks directly from the Blackfoot Milling and Manufacturing Company. I am not clear on that now. I believe these orders were continued during all of the time that I was at Bonita.

Cross-examination.

Wallace was on the Hellgate, near what is now Clinton. It is seven miles, I believe, upstream from the Bonita Mill. There were two mills at Wallace, one was No. 1 and the other No. 2. The time-books and commissary supplies for both mills were handled at Wallace, and while the foreman kept at No. 2 his own time-books, it was submitted at the end of the month for settlement to the office up there.

At that time I did not know anything about the Montana Improvement Company intelligently. While I spoke of being employed by the Eddy Hammond Company, it might have been that I was employed by the Montana Improvement Company. The reason I said the Eddy Hammond Company is because the store at that date was known by everybody as the Eddy-Hammond Company's store. The date I went up there, to the best of my recollection, is June 17th, the day after the first Blackfoot dam went out. In the year 1885, prior to August, the place [89] had been known as the Eddy-Hammond & Company's store. It was changed about then to the Missoula Mercantile Company. It was while it was the Eddy-Hammond & Company's store that I was employed



(Testimony of Sidney C. Mitchell.)

at the mill, prior to August, 1885, as far as I know. I do not know whether my employment was actually by Eddy-Hammond & Company, or whether it was the Montana Improvement Company. I had been at the Bonita Mill just for a couple of days in 1885 prior to the time that I went to work there in May or June, 1886. Mr. Henry Hammond sent me up there to assist the man that was keeping track of the commissary supplies and get the books posted up and get him straightened up a little. He had more work than he could attend to and I did not have much to do so I could help him out. I was employed by Henry Hammond and he sent me there. I went up there in the fall of 1885. I could not give you the month. It was not at the time they were moving and setting up the mill at Bonita. The mill was operated. It was in the fall. I went to work there the following year, in probably May or June. Fred H. Hammond was in charge there at the time I went to make those changes in the books. At that time there was a small store selling goods, wares and merchandise to the employees, and I fixed up its books of account. To the best of my recollection, I had been there only about two days on this occasion prior to the time that I was employed in the fall of the year 1886. In 1886 I went to work for Mr. George W. Fenwick, who is here in the courtroom. His headquarters were at the mill at that time. The same store was there at that time. I did not take charge of the store that year. You could get such supplies as a millman wanted, chewing tobacco and socks. It



(Testimony of Sidney C. Mitchell.)

[90] was a little merchandise supply store. I don't know whether there was a clerk in charge of it before I went there. I think Mr. Fenwick took care of everything himself at the time I went there. In 1886 I think Mr. Fenwick had charge of the store and attended to it as well as the mill. I don't think he had a clerk. I don't remember. I had nothing to do with the lumber shipments from the Bonita Mill in 1886.

Q. Do you know whether or not it was sent to Anaconda direct from the mill?

Ans. Well, the lumber that had been cut, to my knowledge at that time, was not shipped out of the state; but mostly all to the Anaconda Mining Company, either to Butte or to Anaconda.

(Witness Continuing:) The lumber was shipped direct to Anaconda, to its destination, and was not first sent to the Missoula yards and from there to Anaconda. I mailed a bill showing the contents of the car to Missoula. I do not know at that time who made out the bills for the lumber that was shipped to the place and to the person who received and purchased the lumber. I am not clear as to whose name the bills were made out in at any time there. I do not know whether they were made out in the name of Mr. Fenwick or not, the bills to the Anaconda Company. I am not clear as to how the stationery was made at that time. As far as I know, Mr. Fenwick may have billed the same directly to the Anaconda Company and sent his invoices over to Missoula, but I don't think that was the form at that time. I

(Testimony of Sidney C. Mitchell.)

think the bills were sent to Missoula and from there they were invoiced. At Missoula Mr. Winstanley was employed by somebody, [91] but I do not know who employed him. He had a separate office in the Missoula Mercantile Company's establishment. He had a desk in the office of the store. I do not know who paid his salary. I do not know whether he was employed by the Missoula Mercantile Company or by Mr. Fenwick, or by Mr. Fenwick and Mr. Henry Hammond and paid by those persons. I don't remember of anything ever bearing the address of Mr. Winstanley, but I know from my experience that they came into Mr. Winstanley's possession. So far as my experience goes, it is a fact that Mr. Winstanley made up the bills for the lumber to be sent to the purchaser of the lumber, whether it was the Anaconda Company or any other purchaser. I don't know in whose name Mr. Winstanley made out the bills for the lumber that was sent from Mr. Fenwick's mill. So far as I know, he may have made them up in the name of George W. Fenwick. I do not know when the money came back from the sales of lumber whether it came back in the form of cash or in checks, or otherwise. While I was employed there with Mr. Winstanley I did not see any checks for lumber sent from Mr. Fenwick's mill. I did not see any checks for any lumber sent from Mr. Henry Hammond's mill, or the Blackfoot Milling and Manufacturing Company. I know that money came in and credits were made, but I did not have anything to do with receiving the money. I was an assistant

(Testimony of Sidney C. Mitchell.)

to Mr. Winstanley in the keeping of the books. But in keeping these books, I do not remember anything of Mr. Fenwick's business in that office.

The COURT.—Q. You mean entries made in his name?

A. No, sir; at the time I was there the construction of the Bitter Root Valley Railroad was going on and several small mills were working up in the Bitter Root Valley and [92] each mill had its separate set of books and shipments were made from those mills. The contents of the different cars would be mailed and the invoices would be sent out from that office, and as to the payment of those bills, I don't know anything about that. Mr. Winstanley evidently received the amounts that were credited to the account of each mill and each mill had a different set of books.

Mr. WHEELER.—Q. Was the account so kept there of the moneys received for the shipments that were made from the mill that Mr. Fenwick was operating?

A. I don't remember anything about Mr. Fenwick's mill in there. There may have been, but I am not clear on that. I am not clear about that branch of it.

Q. You cannot recollect whether anything was kept in Mr. Fenwick's name, or in the name of the Bonita mill, or any other name? A. No, sir.

(Witness Continuing:) Bonita is about seven miles up stream from Wallace. When I went back to the Bonita Mill in 1890 or 1891, Mr. Graham was



(Testimony of Sidney C. Mitchell.)

in charge. I don't know for whom Mr. Graham was operating the mill at that time, but I understood it was for G. W. Fenwick & Company, or G. W. Fenwick. When I went to work for Mr. Henry Hammond on the Blackfoot Mr. Henry Hammond was operating the Blackfoot Mill. At the time that I was familiar with that property and when Mr. Henry Hammond ceased to operate it, it passed into the hands of the Blackfoot Milling and Manufacturing Company and Mr. Henry Hammond still continued to be the active manager of the property. I never saw Mr. A. B. Hammond on any of the lands that the company was cutting from on the Blackfoot country. I saw Mr. A. B. Hammond once in the Hellgate country when he made a visit to Wallace when I was there. [93]

The COURT.—Were you ever out on the lands they were cutting on at Hellgate?

A. I have been all over the Hellgate, from Bonita to Bear Mouth.

(Witness Continuing:) I scaled a little up there; I had duties that took [94] me out on some of the land; I was taking care of the commissary and made out the bills for the shipments and I did some scaling. While I was scaling near here and was at the mills working in the capacities I have indicated, I never saw Mr. A. B. Hammond. As to this E. F. Rutherford Lumber-yard, where I worked after 1890, Mr. Rutherford owned it; that is he owned it up to a certain time, and I don't know who had charge of it afterwards. I don't think Rutherford



(Testimony of Sidney C. Mitchell.)

owned it at the time I worked there, but the account was carried, I believe, in the name of E. F. Rutherford. I was working in the office there. With reference to the ownership of the yard, I know that Mr. Rutherford did own it at one time. I don't think he made a success of it and it was taken over by, I think, the Big Blackfoot Milling Company. I am not sure about that now. It must have been taken over along in 1890. Concerning lumber that was shipped to that yard from Bonner, that was in 1889 and 1890. None was shipped from Bonita that I know of at any time. I was familiar with those shipments from Bonner and then from this yard at Missoula. The lumber went to the Anaconda Mining Company at Butte and the Anaconda Smelting Company at Anaconda and the Great Northern Railway Company at Great Falls, Livingston, Billings, Phillipsburg, Granite and Helena. Mr. Fenwick purchased his supplies for the conduct of his mill from the Missoula Mercantile Company. Mr. Henry Hammond purchased his supplies from the Missoula Mercantile Company. Blackfoot Milling and Manufacturing Company purchased its supplies from the Missoula Mercantile Company. I am not familiar with an incorporation known as the Big Blackfoot Milling Company, except that I worked for it. It purchased its supplies from [95] the Missoula Mercantile Company. With reference to the purchase of supplies, I had something to do with them. I sent in orders for supplies. When Mr. Fenwick purchased supplies they were put in the

(Testimony of Sidney C. Mitchell.)

storehouse in his store at Bonita. These supplies were sold at a profit. He purchased them wholesale in Missoula and sold them at retail in Bonita. I have no personal knowledge of the profits that he made at that time. Whether they belonged to him and whether he retained them or whether he paid them over to anybody else. I do not know in reference to his account at the Missoula Mercantile Company, whether or not he had a credit there, so that he could give his men time checks payable at the Missoula Mercantile Company. His men were paid with an order on the Missoula Mercantile Company. I think men were occasionally paid at his store in cash. I don't remember of any particular instance, but if a man worked there a half a day he would get a pair of gloves or the money or a pair of socks and some chewing tobacco. In the case of the regular monthly payroll, that was made out and sent down to the Missoula Mercantile Company's store. I do not know what arrangement Mr. Fenwick had for the advancement of money to him. I do not know whether or not he had cash on deposit with the Missoula Mercantile Company's store. Mr. Fenwick also sold from his store hay and grain that he purchased from surrounding farmers and stockmen. Also beef for the commissary and the camp.

Q. The custom at that store was not confined absolutely to loggers; if a prospector came in and wanted to purchase supplies there, he could do so?

Ans. Anybody could purchase there that had the money. [96]

(Testimony of Sidney C. Mitchell.)

(Witness Continuing:) Regarding the method of conducting business at the Bonner Mill, when I first went there there was not very much difference in the way it was done there from that which I have described. Later on the business was conducted altogether in the Bonner office. Collections were made from there and invoices were billed there and the whole business, so far as I remember now, was carried through regularly in the Bonner office. When I was there C. W. Young had charge of the Bonner office, and the name in which the business was transacted at the time C. W. Young had charge was the Big Blackfoot Milling and Manufacturing Company. Mr. Young was an employee of that concern. I think it was in 1890 that the business was transferred from Mr. Winstanley in Missoula to the Bonner Mill office; but I might be a year out of the way on that. All of these places to which the lumber from these mills was shipped were in the State of Montana.

#### Redirect Examination.

Q. Did you keep any record of the persons to whom the lumber was shipped and the purposes for which the lumber was to be used, either at the Bonner Mill or the Bonita Mill?

Ans. There was, in a general way, if I remember right—there was a record kept of each car and its destination, in the office there, but the billing and collecting was done from the Missoula Mercantile Company's store.

(Witness Continuing:) I do not know whether or



(Testimony of Sidney C. Mitchell.)

not any record was kept showing from what lands the logs that were made into lumber were taken—this answer applies to the Bonita Mill. I think a record was kept at the Bonner Mill, in the regular form. [97]

Mr. WHEELER.—The evidence shows that the Hellgate country was not surveyed until about 1902, ten years after this transaction occurred. The sections were not known at that time.

Mr. HALL.—Was any record kept of the lands from which the logs were cut by reference to natural objects in the Hellgate country?

Ans. Yes; they were cut from different gulches.

The COURT.—Was there a record kept of that cutting?

Ans. No record as I know of.

Q. There was no record kept then of the land upon which the cutting was done?      Ans. No, sir.

(Witness Continuing:) I do not know of any record kept at the Bonita Mill of the character of the lands, as to mineral or non-mineral, from which the timber was cut in the vicinity of Bonita Mill. A part of the lumber from the Bonner Mill was shipped to the Great Northern Railroad Company. The use to which that lumber was eventually used was railroad purposes, ties and switch ties, sets of switch ties. It was shipped to Sheppard, Sims & Company, contractors for the Great Northern Railroad. I understood that that firm had its head office at St. Paul. As far as I know, but of my own personal knowledge I do not know, the timbers that were



(Testimony of Sidney C. Mitchell.)

shipped from the Bonita and Bonner Mills to the mines at Butte, were used in mining I do not know what eventually became of the lumber that was shipped from these two mills to Helena and Billings and those other towns that I have named. I never made any record in either mill of the purposes and uses for which this lumber was to be [98] put to that was shipped out. I don't know that there was any such record kept. As far as I know, there was no person while I was at those mills that kept any such record. I don't know as to whether I was sufficiently familiar with the records kept in these two mills to have known of such a record if it had been kept.

I know of the general method of the keeping of the books in those two mills. The books that were kept at the mills were very simple. Every shipment of lumber was made a record of and that was forwarded to the Missoula office and they collected for it and practically handled it. As far as the mills were concerned, no other records were kept than those that were essential for those purposes. I don't know who was the manager of the Eddy-Hammond Company just prior to the transition of the business of that Company to the Missoula Mercantile Company. The earliest recollection I have of a manager of the Missoula Mercantile Company, when I first knew it in 1885, is Herb. McLeod. I do not know what Mr. A. B. Hammond's position was with the Missoula Mercantile Company when I first knew it.

(Testimony of Sidney C. Mitchell.)

Recross-examination.

I saw quite a bit of Mr. A. B. Hammond while the road was being built to the Bitter Root Valley. He was engaged in the work of constructing that railroad. When I testified as to accounts kept at the Missoula Mercantile Company's store, I meant in the sense that I have already testified to, as to their being kept by Mr. Winstanley. Mr. Winstanley's office consisted of a desk in the office of the Missoula Mercantile Company's store. The entrance to the office was, I [99] believe, from Higgins Avenue, at the back of the store. It was on the first floor. The office was moved upstairs. Mr. Harrison, I believe, was in charge of the office upstairs, Mr. Winstanley having quit and gone into the real estate business. I think that was in 1890, or probably the fall of 1889, or maybe the summer of 1890. There was a real estate boom there and Mr. Winstanley got hold of some land and wanted to go into the real estate business. I read in the papers that Mr. Winstanley is dead.

Thursday, January 16, 1913.

**[Deposition of Felix Cyr, for Plaintiff.]**

The deposition of FELIX CYR, a witness called and sworn on behalf of plaintiff, was offered and read in evidence by the plaintiff, as follows:

Direct Examination.

I am about forty-two years old and reside at Bonita. Farming is my occupation. I own some land in the vicinity of Bonita—situated in section

(Deposition of Felix Cyr.)

11, township 11 north, range 16 west. I have lived in the vicinity of Bonita off and on since the year 1885. I am acquainted with A. B. Hammond. I knew him when he first came there. He was there when we came there in 1885.

Q. What was he doing there at that time?

A. They had a sawmill there.

Q. Did you become acquainted with Mr. A. B. Hammond personally?

A. The way I got acquainted with him, I used to get a check—I worked there sometimes, I met him here, he spoke to me, that is about all.

(Witness Continuing:) I knew of the sawmill that was located on section 14. That is the sawmill that was commonly known in that neighborhood as the Hammond Sawmill. When I first came to that neighborhood they were just starting the sawmill and just starting to run it. During the time that the mill was running on Section 14 I saw [100] Mr. A. B. Hammond in and about the mill.

Q. Did he give any instructions to the men who were employed about that mill?

A. Yes, sir, he did.

Q. Did he ever give you any instructions during your employment about that mill?

A. Yes, he did. One time I was working there that first fall and my dad was working there with a team. My dad was supposed to be driving a team, but I was driving; I was fifteen years old then; A. B. come up, he said to me, where is your dad? I said he is over home. He said, you better go back

(Deposition of Felix Cyr.)

and tell him to drive his own team, you are too small. The work I was doing in and about the mill on section 14 was grading a ditch so that they could put in their flume to let the logs into the pond where the mill was.

Q. Now, how long from the time you first became acquainted with Hammond there in 1885 until he ceased to have charge and control, or give directions in regard to that mill?

Mr. BURNETT.—Objected to on the ground that it is putting something in the witness' mouth that he has not testified to.

Mr. HALL.—I will withdraw that question and change it. Did Mr. Hammond continue for any length of time to supervise and give instructions to men engaged about the work around that mill?

Mr. ROBERTS.—We object to the question for the reason that it is leading and for the further reason that the witness has not testified that Mr. Hammond was giving instructions about the mill or continued to give instructions about the mill.

The COURT.—I will let that be answered. He [101] testified that he saw him there.

To which ruling of the Court defendant duly excepted. Exception No. 1.

A. Well, he never gave me—told me about it because there was a boss there taking charge of the camp at that time. Mr. Hammond used to come there once a month, or off and on.

(Witness Continuing:) The first fall I was there, I can't remember the name of the boss who was in



(Deposition of Felix Cyr.)

immediate charge of the mill; he was a red complected man. The next man there was Fred Hammond, brother of A. B. Hammond. I continued to work in and about that mill about three years.

It was here stipulated for the record that it may show that Fred Hammond is dead.

(Witness Continuing:) As to my understanding that Mr. A. B. Hammond was the head man—I told you the way it is. Suppose we work for a business and they say it is Hammond's Sawmill. When we got pay, we went down to Hammond's office to get pay; I always thought it was Hammond's mill, that is all I know about it.

Q. And for your work in and about the mill, who paid you?

A. He gave us a time check at Bonita, and we went down to the M. & M. Company's or Missoula Mercantile Company's store to get our money.

Q. How were you paid on the time checks?

A. They gave us money; a fellow named Jack Keith was cashier there them days.

(Witness Continuing:) As to the man who had charge of shipping of the [102] lumber from the mill and billed it out from the railroad station; I don't remember, the first fall, in 1885, who was clerk there, but I think in 1886 Mitchell was there. I never did any of the shipping myself. I was acquainted, after 1885, with land from which timber was cut that was sawed on the mill on section 14. I have examined the lands in that vicinity recently and had the section corners and the lines pointed

**(Deposition of Felix Cyr.)**

out and indicated to me. I was familiar with section 10, in township 11 north, range 16 west. In them days the land was not surveyed there, you know, but afterwards, since I could see where the cutting was done, it was on that section 10. I recognize what they now call section 10 as the portion from which certain timber was cut. I think it was in the fall of 1885 and '86 that timber was cut from section 10. I couldn't swear which it is now.

**Q.** Do you remember who cut that?

**A.** Well, I couldn't say for sure, in the fall of '85, but that boss was there before the first boss. He was there during the winter, if he left there during the winter—I don't know if he was the one that started on the cutting or not.

**(Witness Continuing:)** The timber that was cut off of section 10 in the winter of '85 or '86 was hauled to the mill on section 14. In the spring of '86 me and dad we skid some logs on the other side of section 10 right back of Bonita next section from section 10. I didn't haul any timber from section 10. The timber that was cut went to the sawmill and was sawed. The timber that was cut in section 2 was cut in the winter of 1886 and it went to the same mill on section 14. I was working at the mill at the time the timber was cut from section 14 [103] immediately surrounding the mill. I started to work in the first fall of '85. They took some logs around the mill there. The timber that was cut off of that section was put in the yards and shipped. As to the person who was handling the cutting and sawing of

(Deposition of Felix Cyr.)

the timber there at the mill, I told you from the first fall of 1885, I forget the man's name, but next spring Fred Hammond come there. He took charge of it.

Q. But what I am trying to get at is not by specific names, but the parties who were running the mill there. Did they supervise and attend to the cutting of the timber off of section 14 and the sawing of it at the same mill?

A. Well, they had a wooden foreman, a man named Ross.

(Witness Continuing:) I don't know whether Mr. Ross was connected with the mill. All I know, he was taking charge of the wood crew, that is across the river in 14. The wood which was cut under Mr. Ross' supervision was taken to this same mill and sawed. I never worked for a man named Jack Welsh, but I worked with him. That was when I was working at the mill.

Q. And how were you paid when you were working with Jack Welsh.

A. There was no pay day; they sent down sometimes every month; when you wanted some money you had to get it, unless you sent for it.

(Witness Continuing:) I had to go to the Missoula Mercantile Company and I was paid there in cash. George Rich logged up in what is called Rich's Gulch on section 6, township 11 north, range 15 [104] west, and these logs were put in the river and driven down to the Hammond Mill. Rich was logging there when I come there that fall in '85 and '86; fall of '86; he was there two years; he was there two



(Deposition of Felix Cyr.)

winters; I know the fall of '85 and '86; when I was working with Jack Welsh I worked different places. One time I was working at the mill and he was working for the Company. After the times I have spoken of I worked in the timber cutting and logging, but not in that vicinity.

Q. Do you know of any place around there where Jack Welsh took any timber and took it to the Hammond Mill?      A. Yes, sir.

Q. Off of what section was that?

A. Well, I don't know if he—that was on section 1. I meant by that, that I couldn't say exactly whether it was all on 1 or some on 2.

(Witness Continuing:) Welsh did not cut any out of Cramer Gulch. The summer of '87 I was employed by the people running the Hammond Mill as a horse herder. I am familiar with the place called Tyler's Gulch and was working in the vicinity of that gulch in the summer of 1887. I did not see anyone cutting timber in that vicinity, but they were hauling logs out of that vicinity that summer. Bill Graham was doing that hauling. The logs were being taken from Tyler's Gulch. They were being taken to the river, to be drove down there to the Hammond Mill. I don't think I could tell you now what sections those logs that came out of Tyler's Gulch come off of. I am not familiar with the sections over there. I knew they were logging off section 20 over in township 11 north, range 15 west, that lies west of Nimrods, some two or three miles. My [105] father was working there at the time;



(Deposition of Felix Cyr.)

that is how I come to know. He was night herding. I couldn't say that I saw them logging at that particular tract. I saw them logging there at the camp. I should judge that the Hammond Mill run about seven or eight years on section 14. I worked three years myself around in there. There was no other concern or person in there on section 14 which was logging and sawing timber in the vicinity of the sections I have mentioned from 1885 until the time they quit running the Hammond Mill. There was another outfit up the Cramer Gulch during that time. That was the Thompson outfit and they were on section 35 up at the head of Cramer Gulch where it forks and one goes to the right and one goes to the left. I should think the Thompson Mill was in operation up there in the year '85 or '86. I couldn't say which—at the time of the trouble which company it was. There was trouble between the Hammond outfit and the Thompson outfit. The Thompson outfit did not log any south of where their mill was situated. The Thompson Mill people logged to the north of their mill. None from the south of their mill.

It was here stipulated between the parties hereto that the so-called Thompson Mill was an independent mill, situated at the head of Cramer Gulch, and operated by independent parties, with whom the defendant had no connection.

(Witness Continuing:) I know of a mountain over in that vicinity that is called Medecine Tree Hill. Timber was logged off the land in the vicinity of

(Deposition of Felix Cyr.)

Medecine Tree Hill. It was put in the river and driven down to the Hammond Mill. I think that was in 1887. Bill Graham had charge of the cutting and logging. I know Hutchin's Gulch in the vicinity of section 14 or on [106] section 14. I know Welsh's Gulch. It is part on section 14—it lies at the mouth of them two gulches. There was timber cut out of these two gulches and shipped or logged to the Hammond Mill. Logging was done in Welsh's Gulch in the fall of 1885, and at the mouth of Hutchin's Gulch, that was logged in 1885 at the foot of the hill, you know. I couldn't say the amount of timber that was on section 14 there in the neighborhood of Welsh's and Hutchin's Gulch, but the timber was something alike all around the rest of the land there—the timber is all alike. In that neighborhood it is pine and fir and not very much tamarack. I was not acquainted with its comparative value as saw logs and saw timber. I was working for wages. I did not know the price of lumber. I know where Beaver Tail Hill is. It lies right across the river from the sawmill. The line runs right in the creek; that is the corner of section 10 and section 11. Some timber was cut off Beaver Tail Hill and hauled to the Hammond Mill. That was done in the summer of '86 or '87. At that time Fenwick was running the mill. I think there was only a few men worked there. There was no crew working there steady; they simply worked out there individually from the mill. I don't know what section Medecine Tree Hill is on. In those days it

(Deposition of Felix Cyr.)

was not surveyed, you know.

Cross-examination.

The part of Rich's Gulch that was cut was at the mouth of the gulch, on up the gulch like. The gulch was cut on the sides, not very far, on both sides. I should say, I couldn't just exactly say, but it was between a quarter and half a mile, I should judge, that they cut up the gulch. I know that after the operations of the mill which has been [107] designated the Hammond Mill, there have been two mills operating in Rich's Gulch. As to whether there might have been a mill operating there before 1885, I couldn't say. I don't know. I was not up there, you know, up the gulch. When they were cutting the timber for the Hammond Mill, I went by the road, I went by the mouth of the gulch, by the county road, I did not go up the gulch. I could not tell you how often I went by on the county road. The way I know that the timber that was cut up there at that time went to the Hammond Mill, was that my father was logging for them, he was logging for the Hammond Mill, that is what I understood. Rich told me my father was logging for the Hammond Mill. That is all I know about it. I was fifteen years old in 1885. The lower part of Hutchin's Gulch was cut on both sides, I could not say how far up the gulch it was cut. I don't know how far. They cut at different times in that gulch. They must have went up a mile and a half, anyway. When I say them, I mean that I worked for Graham.



(Deposition of Felix Cyr.)

Harper and Baird had a mill at that place, but that was after I worked there. McKean had a mill up in Rich's Gulch, and there was another where Morley was cutting—at a place called Little Lake, up in there. I forget what section that is on. I think the Morley Mill was running five or six years ago last fall. I couldn't say for sure. I do not know about McQuarrie being connected with McKean's Mill. McKean was there himself. I couldn't say just exactly when that mill was operated. I didn't work there. I am pretty sure that there was no logging done on Cramer Gulch before the people down at what they call Hammond Mill was operating up there. I do not feel sure that there might not have been small cuttings there for ties and such [108] purposes in the construction of the railroad. I couldn't say as to that. There might have been, and I wouldn't know it; no matter whether I went over the land or did not go over it.

#### Redirect Examination.

They don't usually cut big saw timbers for ties. During the entire time that the Hammond Mill was operating on section 14, there was no other mill around there in the vicinity of Bonita, excepting the Thompson Mill, on section 35. That is the only mill that was up there. The Baird Mill, and the McKean Mill and the Morley Mill all came in there after the Hammond Mill was shut down. The Baird people built their mill very close to where the old Hammond Mill stood. When I first became acquainted with



(Deposition of Felix Cyr.)

section 14, there was no indication of cutting of saw timber off of it, excepting right down at the mill where the mill was sitting, they cut some down when they were building the mill. I should judge my home was about a quarter of a mile from this mill on section 14. I lived very close to the mill. I said in my cross-examination that I knew of Mr. Graham cutting up in Hutchin's Gulch. The logs that were cut and logged there by Mr. Graham were hauled down to the Hammond Mill. There had not been any cutting of saw timber along in the flat up and down from section 14 before the Hammond Mill came in there and commenced cutting, that I know of. I was not familiar with that country about section 14 before the Hammond Mill came in.

Recross-examination.

As to the logs that were taken out of Hutchin's Gulch to the so-called Hammond Mill, I drove a team and hauled logs for the logging company. I took some of the logs. I did not stay there during the entire time that they were taking the logs [109] from Hutchin's Gulch to Hammond Mill. I worked there about a month or six weeks. All I know about it is just what I said, that for a month or six weeks I hauled logs from Hutchin's Gulch to Hammond Mill. I guess the rest went there. I do not know that they did. I do not know that there was a mill operating on section 12 before the so-called Hammond Mill was run. I was on some of section 12. On section 12 there was a man living on a ranch there named Gregg. I know Will's House on that

**(Deposition of Felix Cyr.)**

section. I never knew of seeing the remains of an old mill just west of Will's house known as the old Heacock Mill. I didn't go all over that section. I only went over part of it, you know. I don't know that they take very large trees for bridge timber. I never seen any done, though I testified that they cut ties from small trees. There must have been a great many bridge timbers used in the construction of the Northern Pacific Railroad. I knew that they used a good many bridge timbers through this Hell-gate country.

**Redirect Examination.**

I was not in there when the Northern Pacific was put through, and I don't know anything about whether they took their timber for construction purposes there.

**[Deposition of William A. Cook, for Plaintiff.]**

The deposition of WILLIAM A. COOK, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

**Direct Examination.**

I reside at Bonita. I am fifty years old. I am a farmer at the present time by occupation. I have resided in Bonita since 1885. I was section foreman for the Northern Pacific Railroad when I first took up my residence in the vicinity of Bonita. My residence is now on section 10, township 11 north, range 16 west, at the mouth of Cramer Gulch. I have lived on that section since about June last,

(Deposition of William A. Cook.)

but I have owned it about eleven (11) [110] years. I am familiar with the section lines about my house and farm. My house is located on the northeast quarter of said section and it is pretty close to the center line of the section—a little north of the center. I know where the north line of section 2 is. According to the plat of public surveys, section 35 in the township north joins on to the north side of section 2 of my township. I know where the old Thompson Mill stand is up there. I believe that is on section 35. I am not sure—34 probably. The mountains extend on to the north of section 35. The ground around, taken from the north line of section 1 up section 35, is rough and hilly, and it is all down grade all of the way down on section 35 to the old Thompson Mill site. From the Thompson Mill site, on past my house, it continues down grade. The mountains on either side of Cramer Gulch are rough and precipitous. As section foreman of the Northern Pacific Railroad at Bonita, Montana, I built the siding into Hammond Mill in 1886. I believe it was 1886. I am not certain about it. I was there about a year before that siding was put in. The mill was not in existence when the siding was put in. It was put in in order to ship the mill in the cars. The siding was put in before the mill. I got my orders from the roadmaster of the Northern Pacific Railroad to build that siding and received compensation for building it. I received it from Mr. Eddy, Mr. Hammond's partner. I was paid in cash at Bonita; in fact, we was paid about a mile and



(Deposition of William A. Cook.)

a half west of Bonita. I met him. He was riding a velocipede and I was coming on a hand car and he stopped me there and paid us on the road. I received a letter from the roadmaster through the railroad mail, instructing me to construct that siding. The letter has been destroyed or lost. Afterwards, I had verbal orders from the roadmaster. In fact, he was there several times when I was constructing it. I [111] came to go to Mr. Eddy for my compensation for that work because the roadmaster informed me that we were to keep the time separate—that the sawmill company would pay myself and men. I went to Mr. Eddy personally because I used to see Mr. Eddy every day he was there; he had charge of the mill and he used to be around on the works every day and he mentioned that he would pay us. Mr. Eddy was acting for the concern of Eddy-Hammond & Company and Mr. Eddy was of that firm and the Hammond of that firm was A. B. Hammond. Mr. Hammond was there several times about the work when I was constructing the siding. I don't know, I am sure, what he was doing there, I suppose he was kind of looking after it. I don't remember that I heard him give any directions. Eddy was there in and about the work of the construction of the mill pretty nearly all the time, but Hammond was there a couple of times, two or three times, if I remember right.

Cross-examination.

I don't know just exactly how long it took to construct this siding, but I think, if I am not mistaken,



(Deposition of William A. Cook.)

we worked nine days. It was a spur running in from the main line of the railroad to the mill. There were two spurs, the main spur was about fifteen hundred feet and then there was a spur running to the right of this, a short spur, probably three hundred or three hundred and fifty feet. Mr. Eddy was there nearly all the time; they were operating at Clinton; he used to ride between Clinton and Bonita on his velocipede. I used to see him nearly every day. I remember he was shooting chipmunks most of the time. Quite a sport, Mr. Eddy was. I cannot be certain whether it was '85 or '86 that spur was constructed. It was the latter part of the summer, but I am uncertain [112] whether it was the latter part of '85 or the latter part of '86. I expect I could have looked it up. I have papers where I could get the exact year.

Q. Now, did Mr. Eddy tell you for whom he was acting, or did you just assume whom he was acting for?

A. The roadmaster told me who I was acting for, about keeping the time separate, and Mr. Eddy was giving the orders there.

(Witness Continuing:) The roadmaster told me it was to be paid by the sawmill company.

#### Redirect Examination.

After the spur and siding were constructed they were used to haul lumber and the first thing they done was to ship the mill on the car, and this is the mill that was commonly known as the Hammond

(Deposition of William A. Cook.)

Mill. This mill was located on section 14. I had a verbal contract to do logging on section 10 in that township. It was made in 1887 with Mr. Graham, the foreman. Under that contract I was to get the logs down on the flat, and they hauled them with trucks to the mill afterwards. They were hauled to the Hammond Mill on section 14. I cut 28,000 off of section 10. That is all logging measure. There was a dispute about the pay. I was to get \$4.00 and got paid off at \$3.00. West Fowler handed me a check for payment for that contract. He was secretary or bookkeeper, and was located at the mill. We had a dispute about the payment. I was to have \$4.00 a thousand and Mr. Graham thought I got them down so cheap, he offered me \$3.00. I remember the check was \$84.00 for the 28,000. I had this dispute mostly with the bookkeeper, Mr. Fowler, rather than with Graham, and Fowler [113] said he had orders to pay only \$3.00. I went to Graham afterwards. Fowler was in charge of the books and billing for the Hammond Company.

Q. Do you know the exact title of the firm or corporation?

A. Well, it was going under the name of Eddy-Hammond & Company at that time.

(Witness Continuing:) I know who the partners were. I skidded logs under Mr. Graham on section 2 in Cramer Gulch near the Thompson Mill. These logs went to the Hammond Mill. We hauled on sleighs. Thompson was not operating there at that time; he came in afterwards—the following fall.

(Deposition of William A. Cook.)

With respect to the place where Thompson's Mill was finally established, we took the logs from all around there up the gulch; the most of them; where I was working it was up the left-hand gulch, to the right up the hill. Then we took in opposite Mr. Cyr Parent's ranch. That ranch is in section 2. Thompson did not cut any logs south of his millsite that I know of. I know the Hammond Company did cut some on section 2 south of the Thompson millsite. Mr. Thompson might have cut there, but I don't know. In order for Thompson to have cut there, he would have had to drag his logs back up hill. This timber and country to the north of Thompson Mill on section 35 was all sloping down toward the mill. I was paid by the Company for the skidding in Cramer Gulch on section 2. I received a check from Mr. Fenwick and from the Company; I received a check from Mr. Fenwick; he was the manager at that time, and Graham was the foreman; I believe the check was signed by Eddy-Hammond & Company, I am not certain. [114] I wouldn't swear to that. Eddy-Hammond & Company, by George W. Fenwick, I think.

#### Recross-examination.

It was in the winter of '87 in December, January and February, I worked in Cramer Gulch with my team cutting logs; but I wouldn't swear positively. I know I worked there between '86 and '88. I believe it was '87 and '88—the winter of '87 and '88. I believe it was the winter of '87 and January of '88.



(Deposition of William A. Cook.)

Q. And do you want to be understood as testifying that at that time you got paid by a check signed Eddy-Hammond & Company? A. I believe so.

Q. You think so, you are not sure?

A. No, sir; no, sir; it is a long while ago.

(Witness Continuing:) I made this contract for the cutting off this section 2 with Mr. William Graham. He was foreman. He was wood foreman working in the mill which I called the Hammond Mill; he looked after the logs; he didn't have anything to do around the yards, around the mill, this was scattering timber that had been cut before, picking up scattering timber. I was working by the month; I had my own team; I was getting \$80.00 and expenses. I worked on section 2 the winter of '87 and spring of '88. It was the following spring, or the same spring that I worked on section 10 in the winter, then in the spring, in May or in June, I done this logging. I got 28,000 off section 10. As to how much I got off section 2, I don't know; I was not logging by contract; I was working by the month. I was skidding and running sleigh part of the [115] time; doing everything. As to whether section 2 had ever been cut off of before Hammond went there, I don't think I had been on the ground; I never saw any cut. As to section 10, there had been cutting done there before. This Company had cut it, Hammond & Company had cut it. I was cutting the scattering timber that they left. They were logging on 10 and 4 As to whether or not when I worked on section 2 I found that ties and piling had been cut



(Deposition of William A. Cook.)

on Cramer Gulch, I did not know of any ties, that might have been before I came in, after the railroad was in, they might have cut it before the railroad was in. I ought to have noticed any stumps had there been any; I don't remember. I noticed stumps south of Bonita, some that had been cut there across the river. That was on section 9, in Granite County, across the river, also in sections 7 and 8. I don't know whether most of this timber that was cut and brought down to Cramer Gulch was taken off section 35. I think they took it off a good many sections; they were logging there for quite a few years; there was a good deal taken off section 2. They took it on both sides of the gulch. The land on the east side of the gulch in section 2 is rough and hilly. There was considerable timber on that side. I know that Kendall Bros. operated logging camps and saw-mill in the years 1897 and 1898 down there. I was there at the time they operated. They might have cut some on section 2, but they were farther up the gulch most of the time Hadley Morrison might have cut some on section 2; he was subcontracting under Kendall Bros.; I don't know that they cut any themselves, although I believe they cut some. The slope is not very great in the gulch between north of section 2 and section 35, but on the hill it is [116] pretty steep. I am not prepared to state that there was no timber at all taken from the northerly half of section 2 to the mill operated on 35 by Thompson. I don't know. As to the timber on section 10, that 28,000 feet that was cut there it was all pine, with

(Deposition of William A. Cook.)

the exception of two or three firs. It was not very good quality. It was timber that the Company left behind them, the Hammond Company. I saw them logging there at an earlier date, that was about a year before I got there, a year or two or year and a half, they were logging with cattle, hauling out with bulls. Under this contract under which I cut this 28,000 feet, I was to cut them off the three forties on the north side of section 10. I did not do any cutting elsewhere on that section; I cut them all on the two forties, northwest, and I didn't cut any on the westerly forty in the northeast quarter of section 10. That laid over in Cramer Gulch. As to the southeast quarter of the section, I own that, all that up there now; it is agricultural land, that is, pasture land, mostly. The timber was taken off that south slope. I think that timber was cut by the Hammond Company, I wouldn't be certain about it. After they moved the mill in. I have never pulled stumps out of that land. I have testified several times about the Hammond Company operating a mill. I am satisfied in my own mind that I know just exactly what was the concern or outfit which operated it.

Q. Just state what your own knowledge is; we don't want any hearsay.

A. No, hearsay; I was on the ground when they moved in.

Q. When who moved in? [117]

A. Eddy and Hammond.

Q. They didn't have a sign of Eddy and Hammond on, did they?

(Deposition of William A. Cook.)

A. No, sir; they did not.

Q. How do you know it was the Eddy-Hammond Company?

A. I am satisfied in my own mind; it was known as the Eddy-Hammond Company.

Q. It was known by you?

A. Yes, and by everybody else.

Q. What do you know about it?

A. I know I received a check from them signed by Eddy-Hammond & Company, by George W. Fenwick.

Q. Are you sure of that?

A. Not absolutely sure; I testified that I was not.

Q. What else do you base that inference on, that Eddy-Hammond & Company (interrupted)—

A. It was known all the time as the Eddy-Hammond Company around there, Mitchell managing it.

Q. What do you know of your own knowledge, you say it was known, who knew it? Did you know it? A. Yes, I am satisfied of it.

Q. Tell me what you knew, I want the facts. I don't care about your conclusion. What did you know?

A. Just in a general way, the same as everybody else.

Q. You told us you thought you got a check signed by Eddy-Hammond & Company, by George W. Fenwick. What other circumstances led you to the conclusion that the [118] Eddy-Hammond Company owned or operated that mill?

A. Well, they were managing it, and they were

.(Deposition of William A. Cook.)

there and received orders from Mr. Eddy.

Q. We don't care about their managing it. What was done by the Eddy-Hammond Company to make you think that they were managing it?

A. I was there at one time when Mr. Hammond had a fuss with a contractor, George Ritz; he was a contractor logging; they almost came to blows in Bonita.

(Witness Continuing:) That was before they put the mill there, this man Ritz logged about a year before the mill moved there, and banked them on the river above the Will's place; that would be about 1884. I don't recall any other circumstance which to my mind made me feel that Eddy-Hammond & Company were operating that mill.

Q. Well, then, to summarize: there is the instance of the check and there is the talk which Mr. A. B. Hammond had over a logging contract with Mr. Ritz.

A. Ritz was logging for a man by the name of Kiser at that time, he was taking timber that A. B. Hammond claimed.

(Witness Continuing:) These are the only two circumstances that I can now recall that led me to the conclusion that Eddy-Hammond & Company were operating that mill.

#### Redirect Examination.

The fact that Mr. Eddy paid me for the construction of the side track did not particularly have anything to do with this conclusion I formed. I knew in my own mind it was the Eddy-Hammond Company; they had been operating down there at Clin-



(Deposition of William A. Cook.)

ton and other places under the firm name of Eddy-Hammond [119] & Company.

Q. Then you were already so satisfied that this made no great impression upon you? A. No, sir.

(Witness Continuing:) The fuss between A. B. Hammond and Ritz was that Ritz, it seems, had taken a contract from Mr. Hammond to cut logs, and he afterwards sold the logs to A. C. Kise & Company, and was going to drive them down some place down Rock Creek, and Hammond wanted the logs and he afterwards got them. Kise didn't use them at all. Hammond got them from Ritz, afterwards; Ritz went and logged for Hammond for two or three years after that. These logs were got out of Will's Gulch, that is the old name for Rich's Gulch. I used to run by there every day. I used to see them running by. I don't know what section they were cut off. At that time they used fir and tamarack timber for ties and bridge piling. There was fir and tamarack growing in section 2. There were some growing on the flat and some on the hill. They used smaller timbers for ties than they did for saw timber. Kendall came in there with a mill in '97 or '98. That was after Hammond & Company cut the timber off of section 2.

#### Recross-examination.

I know that for bridge construction and culverts they used 9x16 for the stringer.

Q. You know that all along that Hellgate River it was the practice to cut, and hew out, if need be, these large timbers for that purpose.

(Deposition of William A. Cook.)

A. Them days they cut timber wherever they come to, they didn't pay any attention. [120]

Q. For railroad purposes?

A. Yes, I suppose so. They cut it any old place. I cut some myself. They paid no attention to the lines.

Redirect Examination.

I never did see any evidences of tie chopping or timber hewing in Cramer Gulch. I remember seeing it in sections 6, 7, and 8; that is across the river in Granite County.

**[Deposition of Charles W. Helmick, for Plaintiff.]**

The deposition of CHARLES W. HELMICK, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

Direct Examination.

I reside in Helena, Montana, where I have lived since 1885. By occupation I am a civil engineer and a graduate of civil engineering from the State University of Iowa. I have followed my profession since 1887. I was living in the State of Montana in 1888 and was employed by one M. J. Haley, who was a Special Agent of the General Land Office of the United States, to make an examination of certain lands. I have notes made by me at the time of this examination. The notes were made on the ground. Referring to these notes, I now testify that I made an examination of the southeast quarter of section 28, in township 14 north, range 14 west. I was em-

(Deposition of Charles W. Helmick.)

ployed by Mr. Haley on some timber cutting cases, to look for corners that he as Special Agent had in charge. My work was to look up the corners of the sections and to count logs and stumps and such things as that, as I could find them. I ran out the east line of section 28. I found the northeast corner and the southeast corner, but the quarter section corner was gone; but I could tell by a mound in place there approximately the line of the southeast quarter of section 28. [121] As to the work I did towards examining the amount of timber that had been cut on this quarter, we went over the southeast quarter of section 28 and counted the stumps, Mr. Haley and myself together. On that quarter we found 1635. We did not make a stump and top scale, but just merely counted the stumps. Mrs. Henry Edgar was occupying the tract of land at that time. She was living in a log cabin on that place. It was October, 1888, that I visited the land. I did not see Mr. Edgar there. My notes show that the improvements of H. F. Edgar consisted of a double log house and some log outbuildings, of the probable value of \$150.00; no ground that I saw had been planted and broken. My memory is that we went over the entire quarter. My notes state explicitly that none of the ground from which the timber had been cut had been plowed and cultivated. I found none that had been plowed and cultivated at that date.

Q. Could you tell from the condition of the stumps and the tops of the trees on the ground about how long the timber had been cut?



(Deposition of Charles W. Helmick.)

A. No, sir; I don't remember as to that, but the tops and stumps, my memory is the tops and stumps had not rotted at that time, so that it could not have been very much prior to that time, more than a few months, anyhow, probably a year or two. I would not think it was any more than a year or two.

(Witness Continuing:) On the northeast quarter of section 28 I found quite a number of logs already cut, I counted those logs. I don't remember a logging camp on said section. My recollection is that the Edgar claim must have been a pretty well timbered claim because there were lots of stumps and they were large stumps mostly. As to whether the cutting had been done in [122] such a manner as to indicate it had been done for the purpose of cultivating and the improvement of the land, or for the purpose merely of cutting and removing the timber, inasmuch as there was no ground cultivated whatsoever, my impression is that that land was cut off simply for the timber that was on it. I drew that conclusion simply from the fact that there was not any cultivation and the logs had all been taken off, removed. In reference to this tract of land and the timber that evidently had been on it and comparing it with the land surrounding it as to timber value, judging from the size of the stumps and the tops lying around in there, I should say that the southeast quarter of section 28 had been at one time more heavily timbered than the northeast quarter, where the logs were banked. I have testified that I found the logs banked on the northeast quarter and that



(Deposition of Charles W. Helmick.)

there were skids there. Mr. Haley and I and Mr. George Ogden counted them. From this I may say I had some knowledge of the surrounding lands.

**[Deposition of George H. Reeder, for Plaintiff.]**

The deposition of GEORGE H. REEDER, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

Direct Examination.

I am fifty-four years old. I live about ten miles northwest of Craig, Lewis and Clark County, Montana. I am at present engaged in the livestock business, but was formerly a civil engineer by profession. I came to the State of Montana in October, 1883, and for some time after my arrival I followed my profession or matters allied with it. I came here in 1883 as chief draftsman in the Surveyor General's Office and I filled that position, I think, for about probably six months or eight months, and then became chief clerk, and [123] about the beginning of 1886, my memory is not real good, I think I resigned from the office and started an office of my own in town here. In August, 1886, I was employed by M. J. Haley, a Special Agent of the General Land Office, to retrace the lines of section 28, in township 14 north, range 14 west; and I examined the southwest quarter of said section. My duty in so doing was to investigate the amount of timber trespass, illegal cutting of timber. I cannot say that I remember the day I visited said southeast quarter; I put it down

(Deposition of George H. Reeder.)

in my note-book, which I have here. (Witness produces note-book.) These notes set down in this book were made at the time while I was making the examination on the land. Examining the book, I can state that I made my examination of the land August 13, 1888; that Mr. M. J. Haley accompanied me. He was in charge of that investigation. The witness here referring to his notes and refreshing his memory therefrom, testified as follows:

August 13 I met Mr. Burbeck in the morning crossing Elk Creek, and reached Eddy and Hammond Camp, on Big Fish Creek about noon; took dinner in the camp and in the afternoon examined, in company with Mr. Haley, the pre-emption claims of Mr. Edgar and Mr. Willett. Mr. Edgar's claim is on the southeast quarter of section 28, township 14 north, range 14 west. He has cut from his claim about 25 acres, near the southwest corner of his claim. I found about twenty-five acres of land on the Edgar that had been cut over, and passed through this tract of twenty-five acres. I did not attempt to count the stumps or measure them.

Q. Was the timber that was cut off there cut off completely?

A. All the merchantable timber was cut. [124]

(Witness Continuing:) There was some standing timber left on this particular tract that had been cut over, but it was of no value for logs, no value for lumber. The timber that had been cut was saw timber. I went over sufficient of the quarter section that I could make an estimate of the cutting, that is,

(Deposition of George H. Reeder.)

I have some idea of the amount of cutting that had been done. I saw no indications of cultivation on the Edgar claim. As to improvements I found on the Edgar claim, a double log house, each about 16x30 and two other log buildings. I should judge the value of these improvements would be worth about \$250.00. On my visit to this land I saw a logging camp, my impression is to the east of the Edgar claim. I don't know what section it was on. That camp was locally known as the George Hammond Camp, and it was the camp on Fish Creek. The cutting on the Edgar claim from the Hammond Camp on Fish Creek was just a short distance. It might have been a half mile or mile—something of that kind, and such cutting was just a short distance from the Big Blackfoot River. I cannot say how far. I am familiar with the manner in which logs were brought down or rafted down from the country in the vicinity of the Edgar claim to the mill at Bonner. They banked them on the edge of the river, at a period of high water they would turn them loose and float them down and catch them with a boom. I knew of a mill at that time that was commonly called the Hammond Mill at Bonner. I did not count the stumps on this twenty-five acres on the southwest corner of the Edgar claim.

Q. And had the tops of the trees been removed or were they left lying on the ground? [125]

A. I think some of them had been burned and some of them were still lying there; there was a timber fire in progress while we were there.



(Deposition of George H. Reeder.)

(Witness Continuing:) There were no clearly defined logging roads leading from this timber cutting on the Edgar claim down to the Blackfoot River; the fire had evidently struck through there and removed traces of almost any operations, you know, except the stumps themselves and tops. This fire was along the Blackfoot River in between Hammond Camp and the river; I should say it took in a part of the northern part of section 28. The trees had not been cut there a great while prior to my visit. I didn't make any special examination of that.

**[Deposition of Milton Hammond, for Plaintiff.]**

The deposition of MILTON HAMMOND, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff as follows:

**Direct Examination.**

I am sixty-five years old, and was born in New Brunswick. I am a naturalized citizen of the United States. I was naturalized in Missoula some years ago. I don't remember the date. I have resided in the State of Montana twenty-five years this September coming. At the present time my occupation might be stated to be that of a farmer—I am not doing much of anything. I have never individually engaged in the lumber business in the State of Montana, but I worked in the lumber business at Bonner Mill, on the Blackfoot River. A. B. Hammond first got acquainted with me in the fall, I think, of 1887. He is a very distant relative of mine. I worked for the Blackfoot Milling and Manufacturing Company.



(Deposition of Milton Hammond.)

I understood at the time A. B. Hammond was a stockholder, but to say that he was, I couldn't [126] say. The first company that I worked for went under the name of W. H. Hammond, and that was when I went up in the Blackfoot, I think in September, 1887.

Q. By whom were you employed there?

A. Why A. B. Hammond sent me up from Missoula. The way the thing was, he gave me a letter to George Hammond. George Hammond was up there, supposed to be the walking boss, or something of that sort; I had a letter to him and went to work as a scaler. There was nothing said when I was to be employed there, as to who would pay me or from whom I would receive my compensation. As to what Mr. Hammond said when he came to employ me, I was with him around Missoula about a day, I think. He showed me around there quite a little, and he asked me what my business was, or what I was best fitted for, something to that effect. I told him timber business, so he said, go up to George, and he gave me a letter to George Hammond.

Q. This was A. B. Hammond who gave you the letter and he employed you?

A. This was A. B. Hammond.

Mr. BURNETT.—The witness has not said he employed him.

Q. Did A. B. Hammond employ you?

A. He gave me a letter.

(Witness Continuing:) He gave me a letter of introduction, and said I was a scaler, and so on; that

(Deposition of Milton Hammond.)

was in the year 1887. I worked in the Blackfoot seven years. During those seven years, I don't know anything about who the stockholders were of the corporation or copartnership that conducted the [127] business about which I was working. As to the name of the corporation, the first that I worked for, was W. H. Hammond, and then I think the next was the Blackfoot Milling and Manufacturing Company, and I think it became the Blackfoot Milling Company. As to the time that I was working for W. H. Hammond, I got my pay the first year that I was working, I came off the Blackfoot in the spring, and W. H. Hammond set the wages and they paid me and gave me a check on what is now the Missoula Mercantile Company. I got my pay there. I don't remember at the time what was the name of this institution now called the Missoula Mercantile Company. I think it was Eddy-Hammond & Company at that time. While I was working up along the Blackfoot River, I scaled in the woods. Mr. George Hammond was the walking boss, and my instructions, were to report to him. W. H. Hammond instructed me to report to George Hammond. The timber that I scaled up there I did at the direction of George Hammond. He was located at Fish Creek Camp, that was Headquarters Camp. As to how I would know what particular section or quarter-section of land I scaled, you might as well ask me how I know I am in Helena. I followed the skidders. I scaled part of section 28, in township 14 north, range 16 west. Quite awhile after that, I scaled the timber on section

(Deposition of Milton Hammond.)

18, in township 13 north, range 14 west. That timber was cut two or three years after I first came to the Blackfoot. I couldn't say just what year that would be for certain, but it must have been in the '90's, somewhere, from recollection. That was after I left the camp at Fish Creek and went to Bonner. When I left that Fish Creek Camp, I went to Bonner and worked at Bonner that summer, and up the river in the winter time. If I scaled there on section 18, in 13-14, I scaled very little. I was not the regular scaler at the camp. I think George [128] Hammond cut and hauled the logs off that section 18. I don't know positively who cut the timber off of section 18. It might have been Jack Dunnigan—I don't know. My recollection is, as nearly as I could say, I think that George Hammond cut it; I am not certain. The logs that were taken off of that section must have gone to the mill and been sawed at Bonner. All logs cut along there went to Bonner. There was no other place to go. Referring to section 28, in township 14 north, range 14 west, that was the quarter section known as the Edgar quarter. I was present when part of that quarter section was logged. I scaled that section. The logs that were cut off the Edgar claim—off that southeast quarter of 28, were put into the Blackfoot River and taken to Bonner. I think that was 1887. I am not right certain, but I think that was the first year I was up there. W. H. Hammond was running the mill at Bonner at that time. I don't remember what amount of timber was cut off the southeast quarter of section 28. I scaled



(Deposition of Milton Hammond.)

it—John Hammond and I scaled it together. I have no recollection at all of the amount that was cut there. As to the comparative value of that quarter section of land as compared with surrounding timber land, I would say it was a nice claim. I scaled the timber on the northwest quarter of section 34. That was the same year. Jack Cunningham cut off the logs and they were sent to the Bonner Mill. I think I scaled timber that was taken off section 20, in township 14 north, range 14 west. I don't remember what year that was cut in. My recollection is it was Gilbert who cut off that section. The logs taken from that section all went into the Blackfoot River and to the Bonner Mill. I don't remember what year it was that [129] cutting was done off of the south half of section 20, in township 14-15, but it must have been along in the '90's somewhere—'92 or '93, I don't remember. I don't remember anything as to the amount of timber that was cut or scaled off that particular tract. I know the Sontag Ranch. I know there was timber cut on the Sontag Ranch; I couldn't tell you exactly; not on the Sontag Ranch, but on section 22 there. I don't remember the quarter section, that was somewhere right east of the Sontag Ranch, up on the hillside. I think that timber was cut in 1888 by Cunningham. All the logs went to the Blackfoot River and to the Bonner Mill. I was employed about the Bonner Mill as a shipping clerk; I was there seven years; my duties as such shipping clerk were to put all orders in the mill and ship all lumber that came from the mill, that is, that was



(Deposition of Milton Hammond.)

shipped from the mill; the lumber that went to the yards and piled in the yards, I had nothing to do with, but the lumber loaded from the mill I billed it out and shipped it. I got my directions when they wanted to ship out a bill of lumber as to the amount of the lumber, the dimensions and such matters, from C. W. Young, who was the bookkeeper; the second year I was there—the second or third year, I don't remember how long—we changed from time to time. I don't know the prices at all that the company received for the timber it sold during the years I was there, as shipping clerk; I don't know for certain; I have no way of knowing, only from hearsay; what they told me; or what I heard.

Q. Have you any knowledge as to what the general market price or value of the timber was that was sent out of the mill during those years? [130]

A. Well, my recollection, as I say, I don't know for certain that that is right, because I didn't have access to the books, only as we talked, but I am of the impression that the price was about \$10.00 per thousand lumber feet. That is my recollection. I don't know that it is true. That is what I understood.

(Witness Continuing:) I would not say that I was familiar with the market value of lumber in that vicinity.

Q. Was there any other mill close by there or any general market outside of the market of this mill for lumber that was being cut?

A. There were other mills, of course, up at Bitter Root and another mill up at Bonita; of course, I

(Deposition of Milton Hammond.)

know nothing about them. I knew that they were there. I know where some of the lumber was shipped that went out from the Bonner Mill during those years. Some of it went to Anaconda and some went to Butte; some went to Marysville and some went to Missoula; general market all over. They usually sawed all kinds of lumber at the Bonner Mill. There was some mining timber, and lots of 2x4's and 2x6's house timbers, boards.

Q. Do you know whether or not there was any difference in the price of the various lengths of lumber, if the longer lengths would be sold at more or less price than the shorter lengths?

A. Well, I think the price of lumber, the way I remember, was all one price practically, up to 22 ft., after that, I think there was a different price. Now, that is the way I remember it, whether it is straight or not, [131] I don't know. As I say, I had no access to the books; it is hearsay to me. Of course, long lumber would be worth more than short lumber. Lumber that was 20 and 24 ft. long would naturally bring more than shorter lumber, but the prices I did not know.

(Witness Continuing:) I think Cunningham and I scaled what was cut off of section 22 east of the Sontag Ranch. I think it was somewhere about five hundred thousand, something like that, and all those logs went to the Blackfoot and the Bonner Mill. The way I came to go to A. B. Hammond when I was first seeking employment was this, I had written to A. B. Hammond from Stillwater, Minnesota, about

(Deposition of Milton Hammond.)

the business, and he wrote me to come out; well, the way he expressed it, he said he would give me as good a job as I was capable of filling, or something to that effect. When I came out, I looked him up, talked to him some, and he sent me up to George, as I said before. While I was in Stillwater, Minnesota, I had two or three letters from Mr. Hammond. In one of them he told me to hire forty men and come out with them; I picked up a few men there and sent them out here, and finally came myself. Hammond wanted lumbermen. After I came out here I saw two or three of the men that I had sent out to work in the lumber business. I saw them on the Blackfoot, one or two of them; I saw them around Missoula at different places. I see there are one or two here to-day that came out about the time I did. Mr. Green came out about the time I did; maybe a week or a month before.

Q. Do you remember having a conversation with A. B. Hammond about the work of cutting this timber that you testified to? [132]

A. Very little.

Q. Well, did you have any at all?

A. You are asking me something that happened twenty-five years ago. I have not got any data or anything of the kind. I used to see him once in a while and talked to him a little, of course. I remember one conversation, I remember talking to him a little about the scaling up there one time.

Q. When was that conversation? Do you remember about the time?



(Deposition of Milton Hammond.)

A. No, sir, I don't. It must have been about the first year I was there.

Q. What was said to Mr. A. B. Hammond? What was said by Mr. Hammond to you, about the scaling of the timber on the land?

A. I don't know how the conversation started, but he asked me how the scaling compared with the railroad scale. Of course, the railroad had their scaler and we had our own scaler, and he asked me one day how the scales compared. I told him I didn't know; that the orders were to not let each other know, to not let the railroad know what we got; he told me he thought it would be a good thing to understand each other and see how we were getting along. The railroad people used a Doyle rule and the other people used a Scribner, and there might be a little discrepancy between the two rules. After I went back I told George about it, so that we used to compare scales and work together like.

(Witness Continuing:) During the entire period that I was there I received my orders and directions from the same people—practically the same. Mr. A. B. Hammond never told me at any time what relation he bore to the Company that [133] was operating. I don't think he told me what relation Mr. W. H. Hammond had. I never at any time received any directions about the work from A. B. Hammond. I never saw A. B. Hammond on the Blackfoot at all. I have seen him at the Bonner Mill.

Q. What was he doing up at the Bonner Mill?



(Deposition of Milton Hammond.)

A. He would come up from Missoula with a man or two. They would walk around or look at the mill, just on a kind of picnic or excursion, something of that kind, the same as you or I would go to look at the mill.

(Witness Continuing:) I never had any conversation with him in the Missoula Mercantile Company's place of business in Missoula in regard to the cutting of lumber. As to section 18, in 13-14, I couldn't tell you whether the cutting that was done there, which I scaled, was off any particular part of the section or was general all over the entire section. I know that George Hammond worked there at that camp. I think he cut that section. I was there more or less. I don't remember whether any of it was cut off the northwest quarter of section 18. I visited section 18 the other day. I saw the northwest corner, the corner stone of that. Dunnigan or George Hammond cut all around that corner stone. I don't know whether they cut any off of the northwest quarter of section 18.

Q. Do you remember whether or not there was any cutting done off of that, the northwest quarter of 18?

A. Yes, of course.

Q. And who do you say did that cutting?

A. My impression is, as I told you before, I think George Hammond cut it. It might have been George Hammond or Dunnigan. I couldn't say for certain. They both worked in there; which one did it for sure, I couldn't say positively. [134]

**[Deposition of James Van Keuren, for Plaintiff.]**

The deposition of JAMES VAN KEUREN, a witness called and sworn on behalf of the plaintiff, was thereupon offered and read in evidence by the plaintiff, as follows:

**Direct Examination.**

I am fifty-eight years old. I came to the State of Montana in 1885 from Whittlessee, Wisconsin. I first met Mr. Thomas Hathaway in Idaho. After that I met him in Missoula. Hathaway asked me to go to work for the Company. He took me up to the office and introduced me to Mr. A. B. Hammond. He asked me first what I worked at; I told him I was an ox teamster; he introduced me as an ox teamster or laborer to Mr. A. B. Hammond. Mr. Hammond wanted me to go up there to go to work at Wallace. I asked him what he was paying. He told me. He gave me a letter to go to work to take to Mr. Henry Hammond. Mr. Henry Hammond, it seems, was the push up there. I went up there and Henry Hammond told me they were full handed there. He said, you stay here. I will go to Bonita and see how they are fixed up there, and if they are full handed up there, I will put you to work here anyway; I stopped there and he came back and told me to go up to Bonita, and I went to work at Bonita driving cattle, skidding, and I did some loading. This was in the fall of 1885. When I went to work there, the mill had been set and established on section 14 in the Hellgate River.

(Deposition of James Van Keuren.)

Q. Did you do any logging and skidding around the vicinity of the mill, near Hutchin's Gulch and Welsh's Gulch, around close to the mill on 14?

A. Well, across from the mill I did, up the river.

(Witness Continuing:) Recently I have gone over section 14 and had the section lines pointed out to me. The logging that I did [135] in the vicinity was east across the river on section 14. I did some logging north and east of the mill, on about what would be a part of section 10. I did that in the fall of 1885. I logged up on what is known as Cramer Gulch. I was there a little bit in 1885 and in the spring of '86, and all these logs that were taken off Cramer Gulch in section 14 went to the Bonita Mill, on section 14. I never logged any out of Rich's Gulch. I saw Mr. Rich logging there. I am not quite positive what year Mr. Rich logged in there, but I will try to recall the time that I saw him there; that was in '87. When I cut the timber off section 10, there were two different foremen during that time. Mr. Kenneth Ross and Fred Hammond the other; Ross also was foreman when I skidded off section 2 in Cramer Gulch. I saw logs hauled from in and about Tyler Gulch and they went into the river there and I suppose to the Mill at Bonita. I couldn't testify to that, they were hauled to the river. It was the Bonita outfit who was handling these logs out of Rich's Gulch. By the Bonita outfit, I mean it was then called Fenwick. I saw them hauling off section 2 that lies just to the north. They were hauled to the river. It was in '87 that logs were taken off of



(Deposition of James Van Keuren.)

Tyler Gulch, off 22. I was familiar with the general scope of country up and down the Hellgate River and the Northern Pacific Railroad along east from Bonita up the river. During that time there was not any other sawmill or outfit engaged in logging between Bonita and Bear Mouth. I did not myself log or assist in hauling the logs off 22 or 26. I was not employed there. During the time that I was employed in this region logging, I was paid for my services at Missoula, sometimes in cash, sometimes by check. The checks that I got at that time were [136] signed by the bookkeeper. I forget his name—the bookkeeper paid out the cash and that was in the office there in Missoula maintained by the Missoula Mercantile Company. In '86 I had a contract to take logs to the Bonita Mill. I made it with Mr. Tom Hathaway at Missoula. When I talked with him we were in the Missoula Mercantile Company's office, and went out of there into a confectionery store, and he used the phone in there, and we made a deal in this confectionery store, Mr. Hathaway and I. He was talking to Mr. Fenwick over the telephone. Under the terms of that contract I was to put logs on the bank for them for \$4.00 a thousand, log measure, anywhere along the river between Tyler Bridge and two miles and a half west of Bear Mouth. I fulfilled my contract and received my money. I was paid in cash principally, that is only what I had got in supplies and horses and such things as that. As to these horses, I got one pair at Bonita from Mr. Fenwick and I got two more



(Deposition of James Van Keuren.)

horses through Mr. Hammond in Missoula, bought one direct from Mr. A. B. Hammond and Mr. Hammond got me the other one. I gave Mr. Hammond credit on the amount they owed me for the horses that Mr. Hammond turned over to me on the contract under which I had been logging. That contract was verbal. I can remember some of it—the way that he was using the phone talking to Mr. Fenwick I could hear what Mr. Hathaway said; of course, I couldn't hear what Mr. Fenwick said, only as Mr. Hathaway would tell me, and Mr. Fenwick didn't want anything to do with the logging proposition because he thought I had no money or no stock. Mr. Hathaway told him that I had both money and stock and the Company would supply me. He didn't say what company. [137]

Cross-examination.

That was the Missoula Mercantile Company that supplied me with tools and grub and supplies and stock, and I paid for these things out of this money that was coming to me out of this logging contract upon its completion.

Q. Now, this contract was made with Mr. Fenwick, wasn't it? A. With Mr. Hathaway.

Q. Made by Mr. Hathaway for Mr. Fenwick?

A. Mr. Hathaway and I made the contract.

Q. He consulted with Mr. Fenwick first, for all that, isn't that right?

A. It seems that Mr. Fenwick would not have anything to do with it.

Q. And then when Mr. Fenwick found that the

(Deposition of James Van Keuren.)

company took stock in you and your ability to carry out your agreement, and that the company would let you have credit, Mr. Fenwick consented to enter into that contract with you?     A. Not at that time.

Q. He did consent to enter into a contract with you?     A. Not at that time.

Q. When did he?     A. Later on.

Q. Another contract, entirely, you mean?

A. No, sir.

Q. The same contract?     A. The same contract.

(Witness Continuing:) The time the contract was made Mr. Fenwick would have nothing to do with it—at the time Mr. Hathaway made [138] the contract. I had no contract with Fenwick at all; never made no contract with Fenwick at all. I got paid for the work I did through supplies and money through the Mercantile office at Missoula. There was a little left over for me after I had paid for my supplies. I don't know whether I was paid cash or by check. It was the same thing. I got it from the head bookkeeper—the head bookkeeper used to do all his cash business there—not the bookkeeper at the mill. I know his name well if I could think of it. G. W. Fenwick sent a scaler up there to scale the logs I cut—as I cut them and brought them to the river bank. That man came from the mill at Bonita, and I suppose Mr. Fenwick sent him out. I was in Cramer Gulch in 1886. In the spring of 1886, when I came down from Bonita, I went down to the office and A. B. Hammond sent me up to Blackfoot. He was in the office at the Missoula Mercantile Company;

(Deposition of James Van Keuren.)

he sent me up on the Blackfoot to drive team, horses that time, and I went up. I was up there a very short time on the Blackfoot, came down from the hills and went down below Missoula about six miles with a man by the name of John Rankin.

Recross-examination.

I testified that I bought one or two horses from Mr. A. B. Hammond. It was two horses. I paid for those horses with those logs that I cut for them at \$4.00 a thousand. In other words, in my account with the Missoula Mercantile Company I was charged with the price of those two horses, and when I came to settle up with the Missoula Mercantile Company, I was paid just that much less; that is to say, the price of those two horses from what was coming to me, and less the supplies that I had. [139]

Redirect Examination.

The contract for those two horses was made between me and Mr. A. B. Hammond personally.

**[Deposition of Thomas Guinnane, for Plaintiff.]**

The deposition of THOMAS GUINNANE, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

Direct Examination.

I reside about five miles west of Bear Mouth. My business is farming principally; I have worked a little in the woods. Formerly I resided in the neighborhood of Tyler Gulch—within a mile of it. In the spring of '87 I remember my mother boarding some



.(Deposition of Thomas Guinnane.)

loggers at a place called Carlin, now named Nimrod. Those loggers were rolling logs in the river on the north side right below the section-house. The logs that they were rolling into the river had been cut on both sides of the river. The logs that they rolled in there at Carlin did not come from the vicinity of Tyler Gulch, but I saw these men taking from Tyler Gulch and piling up on the banks of the river by Tyler Gulch Toll Bridge. I did not know who the men were that took the logs. I saw some logs taken from the vicinity of what is known as Medicine Tree Hill. Some of them were piled up at Carlin that were taken off from the west side of it. To the best of my knowledge these logs were taken out the winter of '86 and '87. The men that cut the logs on Tyler Creek boarded at my mother's house the fall of '86. Felix Cyr was one of the *man* who worked there. I think these logs were put in the river there at the Tyler Bridge. I couldn't say where they were ultimately taken. I knew of the existence of a sawmill at Bonita, in the spring of '87. There was no other mill being operated [140] there that I know of along the river that those logs might have been driven to. Mr. Fenwick was foreman over the men that drove the logs into the river at Nimrod.

#### Redirect Examination.

I recognized these portions where I saw them cutting timber off as what is now known as sections 22 and 26 and a part of section 24.



**[Deposition of Patrick Joyce, for Plaintiff.]**

The deposition of PATRICK JOYCE, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

**Direct Examination.**

I reside at Potomac, Montana. I am farming. I have resided in the State of Montana since '82, and am about fifty or fifty-one years old. I live in the Potomac Valley, Camas Prairie, which is a tributary to the Big Blackfoot Valley. I was first employed logging at the Eckwall Camp in the fall of '85. I worked until toward the spring of '86. Eckwall Camp was located on the Nine Mile Prairie on the north side of the Blackfoot River. I did sawing around the Eckwall Camp, sawing standing trees. I couldn't tell how many log feet were cut in the Eckwall Camp in the winter of '85 and '86; most of the logs that were cut that winter in the Eckwall Camp were hauled into the Big Blackfoot River. I took most of my pay out in grub, part of it I got paid at the Mercantile Company. I received the grub that I got for my pay from the Eckwall Camp. They didn't have much of a supply store there—I didn't think they was good—I drew all the grub I could. For the balance of my pay for my work W. H. Hammond gave me an order on the Missoula Mercantile Company. That is what is the Missoula Mercantile Company now. I don't remember what was the title then. The way I came to get paid [141] the balance due me was this. I was

(Deposition of Patrick Joyce.)

at headquarters, Mr. Henry Hammond's headquarters at Clinton, and he gave me an order for the balance on the Mercantile store at Missoula. After the Eckwall camp broke up, I went to work at Headquarters at Fish Creek, and was employed there by George Hammond. I worked until the time of the drive in the spring of '86. My particular work at that time was mostly sawing. I worked awhile with J. B. Seely and awhile with Tom Ginn. I worked for Ernest Kilburn. The cutting that I did in the spring of '86 was at the mouth of Fish Creek—from there on down below the mouth of Elk Creek. I at that time had heard of a claim called the Edgar claim. I did not do any cutting on that claim. I don't think that claim had been cut in the spring of '86. The logs that we worked on there at the mouth of Fish Creek in the spring of '86 were what we call go-deviled into the river. They were driven in the river. I think Bob Coombs had charge of the drive for the Hammond Camp on Fish Creek. I think George Hammond was there also. I went down the river part of the way with the drive that spring, down below the mouth of Elk Creek. The logs were being driven downstream. That spring there was a mill at Bonner, known as the Blackfoot Mill, and there was no other mill on the Blackfoot River at that time to which logs could have been driven. I have seen the old Sontag Ranch several times. I worked in the woods there that spring. I quit working under George Hammond at the Fish Creek Camp when I was on the drive. I was on the public sur-

(Deposition of Patrick Joyce.)

vey of the lands in the Blackfoot Valley. I worked there until fall.

Q. Were you ever employed by any Special Agent, or employee of the General Land Office of the United States to do any [142] scaling for the Big Blackfoot Valley?

A. I was engaged to help Scales, help packing, help them cruising and showed them lines and help them run out lines and help them count stumps in several places.

Q. And Mr. Scales was an employee of the Government, was he not?      A. Yes, sir.

(Witness Continuing:) While I was working for Mr. Scales I helped do the counting of stumps on the Edgar claim. That was when Scales was cruising there; I don't remember the year now; it was several years after I quit working for Hammond. We scaled and counted the stumps on the Edgar claim and when we got through counting that piece of ground, then we tallied up to see how we stood; it was about right; had the same count. I have no recollection now of the number of trees I counted; I had then but I have forgotten it now. The cutting on the Edgar claim had been general and was not confined to particular spots. It was very nice timber. The best merchantable part of the timber was cut off. No one was living on the Edgar claim when I counted it. Referring to the time I was working for George Hammond at the Fish Creek Camp, I saw A. B. Hammond on the drive there. He came to where we were driving. That was in the



(Deposition of Patrick Joyce.)

year 1886. I heard a conversation between A. B. Hammond and George Hammond at that time—made it public to the men. At that time there was quite a few quitting and discharged, and they were shorthanded there, and A. B. Hammond came up there and he finally told George Hammond that the next man that would go down he, that is George Hammond, would go down, too. The [143] work that was being done by me and Mr. Scales terminated suddenly. I kept copies of the records made at that time in the field. Scales took them away with him. I have never seen those records since.

**Redirect Examination.**

Mr. Hammond wasn't there very long in and about Fish Creek Camp at the time of this conversation with George Hammond. I couldn't say whether at any time he was there they were engaged in driving logs or handling the logs. He was there and that was the orders he gave George Hammond.

**Recross-examination.**

That was the only occasion on which I saw Mr. A. B. Hammond up on Blackfoot. I have seen him afterwards since then.

**Redirect Examination.**

I never saw him at any other time that I know of when logging was being carried on.

**[Deposition of John Graham, for Plaintiff.]**

The deposition of JOHN GRAHAM, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:



(Deposition of John Graham.)

Direct Examination.

I am sixty-seven years old, and reside at Potomac, or at Nine Mile Prairie at present. I am a rancher by occupation. I have lived here since 1886. I used to work for the defendant, commenced working at logging in the Big Blackfoot Valley in 1886. I supposed I was working for Mr. Hammond. I was not employed at all. I was sent up to the Cunningham Camp by Henry Hammond. Cunningham Camp was located at that time at what was known as the Eckwall Camp. The camp was located on the edge of what is now known as Nine Mile Prairie. I worked at the Eckwall Camp pretty near all winter under the direction of John Cunningham. The nature of my work was driving horses, engaged in [144] hauling logs. The land on which the timber was cut and from which I drove the logs in the year of '86 in the neighborhood of Eckwall Camp was sections 17 and 18, in township 14 north, range 15 west. I have no recollection of the amount of logs that I took off. The logs were taken to the river that winter. They were finishing building a mill on the Big Blackfoot River at Bonner. I have never seen any other mill on the river that winter to which the logs could have been conveniently driven. After I finished my work at the Eckwall Camp, I think I worked awhile at the Fish Creek Camp in the spring of the year. I was just a general hand around the camp. I was working under Robert Moore, who was foreman of the camp. I don't know anything about to whom the camp belonged. For my work I was

(Deposition of John Graham.)

paid by an order from Bonner to the store. I cannot recollect who sent the order to me at Bonner. The store I refer to is that known as the Missoula Mercantile Company's store at Missoula. I was always paid in cash on these orders of the Missoula Mercantile Company. I helped work in the spring of '87, near the camp on Belmont Creek; worked awhile with a man by the name of Harrington that was taking charge of the company, doing some shore logging. I don't know what the sections were. This was in the summer of '87 before the drive. Possibly it was the foreman asked me to go there to that place on Belmont Creek. I didn't get any order from Mr. Hammond. Generally, if the foreman wanted a man, I just had a chance to go to work. I have no idea or remembrance of the quantity of logs that were taken off there. And these logs went into the Bonner River the same as the rest. I couldn't tell you the number of the section. [145] I think there were others working there besides me and Harrington in the fall of '87. I supposed I was working for the Hammond people, was sent up by Mr. Henry Hammond, but cannot recollect where. I worked on the Longley Flat in the fall of '87 or '88. Robert Moore had charge of this work, on Longley Flat. Pat Hayes came there in the winter—he run the camp in the winter. The first work we done was in a camp under Hayes. As usual my work consisted on the Longley Flat of a team and it continued there until such time as they went on the drive. In the winter of '88 and '89 I was working for Pat Hayes. I

(Deposition of John Graham.)

worked for R. J. McLaughlin in the spring of '89. His camp was on Blanchard Creek in the fall. I worked for him in the winter, sometime in the spring. The logs that were cut off in the vicinity of that camp were taken to the Clearwater.

Mr. HALL.—I will cut out what follows because it has reference to section 8, which has been eliminated.

(Witness Continuing:) In the fall of '89, before I went to Blanchard Creek I was employed at the Headquarters Camp, at Fish Creek. Skidded logs pretty nearly all that summer or a good part of the summer; these logs came from lands east, I think, of Sontag Ranch. I guess that would be the direction. At the time I skidded the logs out of there I think there had been no logs cut at that time on the land lying to the south of the Sontag ranch house. There might have been. I don't know. I wouldn't be sure. I won't say anything about it, anyway. I never hauled any logs off of the claim known as the Edgar claim. I think I was in the office of the Missoula Mercantile Company to get my pay during the spring of '87. I met there Mr. A. B. Hammond; at any rate, then or sometime [146] while I was working up the Big Blackfoot, Mr. Hammond asked me how many logs we had got down on that drive; we drove from Gold Creek; I told him probably the foreman of the drive would tell him.

#### Redirect Examination.

R. J. McLaughlin, I don't know where he is. I haven't heard anything of him for the last two years;



(Deposition of John Graham.)

I think he is in the western part of the State or in Idaho. Bob Coombs is dead. At the time I was working on what is known as Longley Flat, I don't think that Mr. Longley lived there. If my memory serves me right, it was after that that he lived there. I remember of seeing him living in that immediate vicinity. I couldn't tell you whether the cutting that was done on the Longley Flat was done around the immediate vicinity of where I afterwards saw his buildings. The logs were cut in the neighborhood. The camp was very close to where he built his buildings. The timber was cut pretty close on one side where the camp was located. While I say it was cut pretty close to the camp, I don't know the distance from the buildings.

[Deposition of M. J. Haley, for Plaintiff.]

The deposition of M. J. HALEY, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

Direct Examination.

I reside here in Helena. By occupation I am Chief Probation Officer. I have lived with my family in the State of Montana twenty-three years, but I will be in Montana twenty-seven years next December. I was employed as a Special Agent of the General Land Office of the United States and I lacked a little over four months of filling that position for eight years. It was the latter part of [147] December, 1884, that I began to act as Special Agent and I continued so to act until July 31, I think it was,



(Deposition of M. J. Haley.)

1892. I made an examination of the land known as the Edgar claim, that is the southeast quarter of section 28, township 14 north, range 14 west, to ascertain the amount of timber cut therefrom. I counted the stumps and averaged, it was not a perfect scale. I didn't make a stump and top scale to ascertain the board feet. I made two separate examinations in that region, one two years after the other. The first examination was made, I think, in 1886. It might have been '87, but it was '86 or '87. It was in the fall of the year or late in the summer. I have forgotten as to the manner in which the timber had been cut and removed. I investigated so many cases that I have forgotten. At that time I made notes of my investigation. I had a book, something like a scaler's book, and each evening we would meet there and I would put down the aggregate amount that each one would report; I think there were five of us for awhile. I had a talk the other day with Mr. Helmick and he said there were but four when he was with me, that is there were five of us but there was one that didn't do any scaling. I think it was on the first examination, which was in the summer, that Mr. Reeder was with me. I do not remember now the amount of timber that had been cut off, not even approximately; I couldn't guess at it now. As to whether all or just a portion of it had been cut off at that time, I think the tract that we examined, if I am not mistaken, the largest timber was cut, the so-called saw timber, I think it was, I am not sure. I don't remember whether there were any trees left standing over the

(Deposition of M. J. Haley.)

area from which saw timber had been taken. It was in the neighborhood of three years after [148] my visit with Mr. Reeder that I went back there again with Mr. Helmick. There was more timber cut in that region at the time of my visit with Mr. Helmick than had been cut at the time of my visit with Mr. Reeder.

Q. Did you have any conversation with any person in regard to the timber that had been cut from that quarter section?     A. What quarter section?

Q. The Edgar quarter section.

A. You have got around on different places.

Q. I understand you, I am asking you solely about the Edgar quarter.

A. Yes, I have talked with persons about that.

(Witness Continuing:) I had a talk with Mrs. Edgar, the entryman's wife. I don't remember whether I had any talk with any person who claimed the logs that had been taken off. I might have. Now, that you have refreshed my memory and asked if I had any talk with Henry Hammond, I think perhaps I did. He was not present on the claim when I was there. If I had a talk with him at all, I think it was at Bonner. I have no notes now that would refresh my memory as to the amount of timber that I found had been cut on the Edgar claim. As to what became of my notes, if you will allow me to explain—along about 1893 I was under the impression, I was so informed, that all those cases were dismissed, and whether myself or whether my wife destroyed those, I don't know, in fact, I don't know what became of

(Deposition of M. J. Haley.)

them; I have looked for them since. When I made examinations at the Edgar claim, I think there were some logs cut on the ground that had not been removed. As to [149], the character of the timber that was cut down, merchantable sawlogs or of a general character, I am not certain, I am not sure about it; I think that they were sawlogs.

I was familiar with the market value of timber in that vicinity during the time I made my several examinations there. That value was about \$10.00 a thousand for manufactured lumber, board measure; that is such lumber as could possibly have been manufactured from the logs found there in the vicinity of the Edgar claim. I don't think there were any other sawmills on the river during the time I made my several visits to the Edgar claim to which the logs cut therefrom might have been driven. I know of a sawmill at Bonner. I don't know who was operating that sawmill at Bonner during those years. The party that seemed in charge of the whole thing was Henry Hammond. I don't know who was in the full charge of the sawmill at Bonner. I know Mr. C. H. McLeod. I did not have any dealings with him in regard to these timber trespasses. I don't think I had any conversation with him in regard to the ownership of the mill at Bonner. I might have, but if I did, I have forgotten. I do not know what Mr. McLeod's business was during those years, but I did know what his business was later on. I was not friendly with Mr. McLeod during those years. I first got acquainted with him—I knew who he was from



(Deposition of M. J. Haley.)

perhaps '87 or '88. I knew that he was working in the mill owned by the Missoula Mercantile Company. I knew A. B. Hammond during those years. He was located at that time at Missoula. As to his occupation, I understood him to be an officer of the Montana Improvement Company, not the president, I think Mr. Bonner was the president, but latterly he was president of the Missoula Mercantile Company, as I [150] understood it. During those years of my official capacity, I examined to ascertain what disposition was ultimately made of the logs that were being cut by Henry Hammond in the Blackfoot Valley. I think it was shipped different places. I have forgotten where. It was sawed into lumber at the Bonner Mill, as I understood it. I should say that the fair market value of this saw lumber at the Bonner Mill, from, say, the years 1886 up until 1890, or 1892, was somewhere between \$7.00 and \$10.00 a thousand. I don't know, but I suppose the price increased according to the grade and size of the lumber. I had a conversation with A. B. Hammond about the general cutting up and down the Big Blackfoot River. I don't know as I had a conversation about the cutting on the Edgar claim. I don't remember what Mr. Hammond told me of the general cutting, only that I know he would assert that they were cutting within legal bounds and all that.

Q. That is, he, and the other Hammonds, they were cutting on the Blackfoot and they were living within the law.



(Deposition of M. J. Haley.)

A. That the company, I don't remember the exact statement, but it was to that effect, that they were.

(Witness Continuing:) I think we had a talk about it two or three times, perhaps oftener than that.

Q. Did Mr. Hammond, or did he not, assume to be in control or have anything to do with that cutting that was then going on on the Blackfoot River?

A. He let me know that he was the head of the whole thing.

Cross-examination.

Q. What did Mr. Hammond say to you? [151]

A. I don't remember what he said, but the impression he gave me was that he was the—that it belonged to the company.

(Witness Continuing:) That is the impression that I have now and that was told me twenty-five years ago. I got the impression from George R. Ogden, whose father was connected with the General Land Office, that these cases, including within them the matter of the Edgar claim, were dismissed along about 1893. George R. Ogden was graduated from the Washington High School about '85. His father was G. V. N. Ogden. The latter had a position in the General Land Office, sort of charge of fraudulent timber cutting in Montana. He was in the service in Washington City when I was appointed. In 1889 he was solely in Montana in charge of matters here; in 1890, in Idaho; and in 1891 back here again in Montana. In 1889 Mr. Ogden was at Thompson Falls—I am sure. As to when I got this information

(Deposition of M. J. Haley.)

from Mr. Ogden, I don't remember when it was; I think I received the information from Mr. Ogden, but it might have been from the United States District Attorney for Montana, Mr. Weed, but I didn't receive the information until at least the fall of '93. I was out of the service July 31, 1892. It was about a year after that that I heard those cases were dismissed. The elder Mr. Ogden discussed with me the merits of these cases, including the Edgar claim.

Q. I will ask you, Mr. Haley, if at any time when you took up the merits of this Edgar claim, or any other of those timber trespass cases pending in Montana at that time, whether you made any written statement and submitted the same to Mr. Ogden. [152]

A. Well, Mr. Ogden and I discussed the thing, and I think it is in his handwriting. He wrote a statement and we signed it.

Q. Reciting what you told him about it?

A. I don't remember, except that it was along the lines, that years had elapsed and it was doubtful about the result of the case, something of that sort, I don't remember what it was.

#### Redirect Examination.

I don't know that George Ogden ever became the attorney for Missoula Mercantile Company. I don't know how long after 1891 he quit the Government service. As I understood, he was a clerk in the General Land Office for a time. The last I saw or heard of George R. Ogden, I saw him at Livingston here a few years ago. I think he remained in and about

(Deposition of M. J. Haley.)

Missoula in the years succeeding 1891 for some time, at different times. He was in the office of the attorneys for the Missoula Mercantile Company, Mr. Marshall and Mr. Stiff. I don't know, but I think this was immediately after he quit the Government service. I think that he had been a clerk in the General Land Office before he came to Montana and went into their office.

Q. And during the time that Mr. George R. Ogden was there in the office of Marshall & Stiff, his father G. V. N. Ogden was a clerk in the General Land Office at Washington, was he not?     A. In 1891?

Q. Yes, 1890, 1889, and 1891.

A. I think he died before 1891, I am not sure, though, whether or not he was living at that time. [153]

(Witness Continuing:) G. V. N. Ogden was living and in the employ of the Government at the time this statement was made and signed by myself and him. Young George R. Ogden at the time that statement was made and signed was, I think, here in town in the employ of the Government.

Friday, January 17th, 1913.

**[Testimony of Charles T. McCullach, for Plaintiff.]**

CHARLES T. McCULLACH, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

I reside at Uplands, California. By occupation I am assistant cashier of the First National Bank. I have resided at Uplands eleven years. I think I



(Testimony of Charles T. McCullach.)

have occupied my present position with the bank six years. They made a change there since I have been there. Formerly I resided in Montana. I first went to Montana in 1888. I was employed by the Helena Lumber Company in Helena. A man by the name of Cameron was manager of the company, I think, and he employed me to work there. I was bookkeeper, and as such bookkeeper had charge of the accounts which indicated the source from which lumber was procured by the Helena Lumber Company. I cannot quite give from memory all of the mills from which lumber was received by the Helena Lumber Company during the time I was employed by it; but the principal shipments were from Bonner. As to the name in which the account between the Helena Lumber Company and the Mill at Bonner was carried, my recollection is that part of the time it was carried as the Blackfoot Milling and Manufacturing Company. It was afterwards changed to the Big Blackfoot Milling Company. I don't remember the exact length of time I remained at the Helena Yard—just one season. While I was working there in the [154] Helena Yard I saw A. B. Hammond there. Apparently he was looking over the business there in a general way. As a bookkeeper I had conversation with him in regard to the business of the Helena Lumber Company. I couldn't say that he made a thorough examination of the books or anything of the kind, but where matters came up that he wanted to know—that is, he had access to the books. I would not say that he



(Testimony of Charles T. McCullach.)

made a thorough examination or anything like that, put in any great length of time looking at the books. He would ask questions about them. I was acquainted with Thomas G. Hathaway, Sr. He was present at the Helena Lumber Yard during part of the time I was working there. I have always recognized him as an auditor, but he acted also in the capacity of a salesman, a general adviser. I was employed by a firm known as D. H. Ross & Company, located at Missoula, Montana. I am not quite clear as to the year when I entered the employment of that concern, whether it was 1890 or 1891. The circumstances under which I was employed to work in that yard were as follows: After I left the Helena Lumber Company I went South and was brought back to Helena as a witness in a case that the Helena Lumber Company had with Cameron, their manager. He defrauded them of some money, and I was one of the witnesses there, and during the time I was there as a witness, Mr. Thomas G. Hathaway asked me to go to Missoula there and take charge of the books. He said that they had a bookkeeper there that was not satisfactory and I went over and took his place. That was in the D. H. Ross Yard. I don't know at that time who owned that yard, but during the time that I was there it developed that W. H. Hammond owned it personally. He is sometimes called Henry Hammond. D. H. Ross & Company received [155] its supply of lumber principally from Bonner, but not necessarily altogether. I am not quite clear on the point as to the name in which the account be-

(Testimony of Charles T. McCullach.)

tween D. H. Ross and Company and the mill at Bonner was carried. I was of the impression that it was carried in the name of the Blackfoot Milling and Manufacturing Company, and about the time of the transfer and after that in the name of the Big Blackfoot Milling Company, but it is possible that they had an account there with W. H. Hammond personally. I would not say positively as to that. I had no occasion to think about it since. It has been sometime ago. I do not remember of Mr. A. B. Hammond ever speaking to me about my employment with the D. H. Ross & Company yard during the time I was there when it was run in the name of D. H. Ross & Company. Afterwards I was manager of that yard, under a different name. I rather think the name was changed before I became manager to the Big Blackfoot Milling Company. I don't remember the exact date I was made manager. I was there likely about three years, I think possibly 1892. It was sometime in the winter when I took charge. More than likely, about January 1, 1892. I would say that, but I would not say so positively. The final arrangement resulting in my employment as manager of that yard was made by A. B. Hammond personally.

#### Cross-examination.

The Helena Lumber Company was a corporation. I do not know of my own knowledge whether A. B. Hammond owned any stock in that corporation—only the verbal statements of the officers of the company. I know nothing as to the actual fact of

(Testimony of Charles T. McCullach.)

whether he did own any stock there or not. As to who else I know as owning any stock there, I don't remember [156] of ever seeing a stock book and I could not say that I did. There were men there that were recognized as being in authority and they would recognize the stockholders in a general way, and myself, as an employee of the company, recognized them; as to the names of those stockholders—Valentine H. Coombs was President and Cameron, my recollection is that his initials were W. H., was Secretary, and there was a young man that was manager of the planing-mill by the name of Gunter. He claimed to have \$2,500 worth of stock in the company, and a man by the name of Hoskins. The Missoula Mercantile Company did not own any of the stock in that corporation to my knowledge. The firm of Eddy-Hammond & Company did not own any stock in that corporation to my knowledge; nor did the Montana Improvement Company. W. H. Hammond who was connected with the Company was the same W. H. Hammond who was at the Bonner Mill. That concern at Helena received shipments from the Bonner Mill. I do not know of any shipments being received from the Bonita Mill. As to other shipments being received from any other mill than the Bonner Mill, we shipped some Oregon fir from coast points. It was a retail lumber yard, but we shipped nothing but Montana lumber, except where the architect's specifications called for outside material. We sold nothing but Montana lumber generally. Possibly we may have bought our Mon-



(Testimony of Charles T. McCullach.)

tana lumber from other mills than the Bonner Mill, but I do not remember that we did. Our instructions were to use everything we could from the Bonner Mill, only buy outside lumber when the specifications required material to be used that we could not get at Bonner. That is the way I understood it. The only knowledge that I have as to whether A. B. Hammond was a stockholder of that corporation or not, is the statements of the officers of the Company there to me as to [157] who was in authority and who had the right as a boss over me and those who I was told had rights as a boss over me were those I have named as stockholders. Everybody told me that a man by the name of A. B. Hammond owned that mill. He stood in a different arrangement than any of these other persons that I have named. He was not an officer of the corporation, but he was recognized as the general financier of the company. It was at both places that he came to look over my books. I couldn't state how often Mr. A. B. Hammond came to Helena while I was there. Not very often. I was there just one season and during that time I couldn't state that I saw him more than five or six times. I cannot give the dates approximately when Mr. Hammond was there. As to when the season that I speak of began and ended, I don't remember. My recollection is that I went there before the opening of the season, sometime in the winter or spring like, and remained there sometime until the following fall or winter. At Helena the weather is so bad, we recognize the summer season



(Testimony of Charles T. McCullach.)

different from the winter season. When I say I was there one season, I mean I was there something less than a year. My recollection is that it began in 1888, I could not say positively though. It began and ended in the same year. By going there the first of the year and staying there less than twelve months, it would begin and end both in the same year. I did not remain there during two years. This Helena Lumber Company handled other commodities besides dealing in lumber, namely, coal and lime, and possibly we did handle some building paper.

Q. Just what do you recollect that Mr. Hammond instructed you about when he was there these five or six or seven occasions during that year that you were there? Did [158] he ever give you any actual instructions, or did he merely examine the books or ask for some information?

A. Well, the only particular thing that I recollect was in regard to some matters that had taken place before my time. He came to the office one day, the manager wasn't there, and he asked me in regard to issuing stock and spoke to me, in a general way, as if I knew what he was talking about. I remember that one thing distinctly, that there was some question about the security that these small stockholders had put up for their stock. As I understood from his conversation, they had not paid for their stock. It was sold to them as a credit proposition and there was some question about the securities, and he asked me in a general way as bookkeeper why I did not

(Testimony of Charles T. McCullach.)

understand these things. It was before my time and it was a question that I did not understand and did not know anything about.

(Witness Continuing:) He asked me some questions connected with the stock at the organization of the Helena Lumber Company itself. It was organized before I went there. That is the only thing that I remember particularly about. I was at Bonner and saw the plant there. It was quite a large establishment; they cut a great many thousand feet of lumber. There was nothing to show me at the lumber yard what particular land any lumber came from, whether it was from a piece of land known as the Eddy claim or whether it was from a piece of railroad land.

Q. So that merely going to this yard of the Helena Lumber Company and making an inspection of that lumber-yard, you couldn't tell whether it came from Government land or railroad land, could you? That is, Mr. Hammond couldn't [159] tell, if he had gone there and made an inspection of that lumber? No accounts were kept of that?

A. Not to my knowledge.

(Witness Continuing:) There was nothing that came under my observation in the way of records kept at the Helena office which would show where the lumber that was in that yard came from, so far as the section of land from which it had been cut was concerned. There was nothing that came under my observation in the way of records that would tell any man whether a piece of lumber came from one sec-

(Testimony of Charles T. McCullach.)

tion or another section of land. With regard to the Helena yard, an account was kept of the lumber that came from the Blackfoot Mill. My recollection is that when I first went to the Helena yard, the account was in the name of the Blackfoot Milling and Manufacturing Company. I can say positively that the account was never kept in the name of the Blackfoot Mill, but I would not say positively that it was not at first kept in the name of Henry Hammond or W. H. Hammond. I know that the lumber was always billed out on their regular billheads, and the first company was the Blackfoot Milling and Manufacturing Company, what was afterwards changed to the Big Blackfoot Milling Company. Of course, they had their regular printed billheads. It was all billed out in that way. I don't know anything about prior to the time I went there, but at the time I accepted my first employment, there was a corporation known as the Blackfoot Milling and Manufacturing Company, and though my employment was after the organization of that corporation, it may have been that the account was kept in the name of Henry Hammond or W. H. Hammond, so far as the business there in Helena is concerned. The time I went to Helena, I did not have any knowledge or [160] information as to whether Henry Hammond, called also W. H. Hammond, was at that time the lessee of the Blackfoot Mill. It was never developed to me that Henry Hammond was the lessee until I got interested in D. H. Ross & Company's books at Missoula. Then I learned he was at that time the lessee.



(Testimony of Charles T. McCullach.)

I don't think I learned that he had for sometime prior to that time been the lessee. I don't think that part of it was developed to me from the accounts that I had charge of. I would not touch on that matter, you see. As to the circumstances under which D. H. Ross & Company went out of business, I am not clear whether that occurred at the same time that the Bonner Mill changed its name or not. That is one point that I am not clear on, or why they changed the name. I don't know about that. I know it is a fact that the lumber yard of D. H. Ross & Company account with the Bonner Mill was made over to Henry Hammond, also called W. H. Hammond. I know it developed from the books, in making the entries on books, that W. H. Hammond was the sole owner of the retail yard at Missoula, where we were just retail sales agents. I couldn't swear positively as to the time this ceased to be D. H. Ross & Company's yard. It has been so long ago, it is pretty hard for me to remember these things. It may have been 1891, 1892 or 1893, along about that time, and when the transfer was made, it was made to the Big Blackfoot Milling Company.

Q. From the Blackfoot Milling and Manufacturing Company, the earlier corporation that had existed?

A. No; my recollection is that the transfer was made either exactly at the date of the change of the name or afterwards—the change of the name from Blackfoot [161] Milling and Manufacturing Company to Big Blackfoot Milling Company.



(Testimony of Charles T. McCullach.)

(Witness Continuing:) I remember that a change did take place during the time I was there and a new corporation was organized. With regard to this new corporation, the Big Blackfoot Milling Company, I never knew anything about it or who its stockholders were. I couldn't say whether they were the same people or different people from those who were connected with the Missoula Mercantile Company, only as to their authority over me in the position that I occupied, and they were the same people that I knew were connected with both companies. I never had any idea and I did not know what were Henry Hammond's relations to the Missoula Mercantile Company. So far as I know, he had no interest in the Missoula Mercantile Company at any time. Henry Hammond exercised authority over me as an employee of the Big Blackfoot Milling Company. A. B. Hammond made the final arrangements for my employment by the Big Blackfoot Milling Company. He arranged for the salary I would be paid. With regard to that lumber-yard, and during the time I was there, Mr. A. B. Hammond was not there continuously. He left for a considerable time. I don't know about the date he left, I cannot remember even approximately. I remember his going to Europe, but that was during the time I was at Helena. Afterwards, when I came back, I remember his stopping for a considerable time away from the State of Montana, in Oregon I understood. None of the lumber was shipped by me out the state or shipped by the Helena Lumber Company out of

(Testimony of Charles T. McCullach.)

the state from the Helena Lumber Company yard, to my knowledge. It was all sold for local uses. [162]

Q. Now, while you were an employee of D. H. Ross & Company, I understood you to say that you are not sure how the shipments from *from* Bonner were carried on the books, whether in the name of Henry Hammond, or W. H. Hammond, or the Blackfoot Milling and Manufacturing Company, or the Big Blackfoot Milling Company. Is that right?

A. I did not mean to convey the idea that I did not know at any time. I know, in the latter years that I was there, that it was all the Big Blackfoot Milling and Manufacturing Company. What I meant to say, and I think you will find that I did testify to it, was that I was not sure there was not an account with W. H. Hammond. That is the idea I meant to convey.

Q. There may have been one before that account was opened in the name of Henry Hammond?

A. It would be before, if at all.

(Witness Continuing:) When I was at Helena the accounts were then carried in the name of the Big Blackfoot Milling and Manufacturing Company; after the organization of the Big Blackfoot Milling Company, and after I came from Helena, all the accounts were carried in that name. I rather think it was either 1890 or 1891 that I went to Missoula and worked there in connection with this lumber-yard. I did not go from Helena, it was after my employment at Helena. With reference to the

(Testimony of Charles T. McCullach.)

sales of lumber from the Missoula yard, the lumber was sold for local use—it was a retail yard there and the lumber was all used in Montana, so far as I know.

Redirect Examination.

Mr. HALL.—Q. When was it that you learned of this supposed or alleged Henry Hammond lease that you spoke of, [163] was it during the existence of that lease, or after it ceased to exist?

A. Well, I learned of it in a general way during the existence of the lease in the matter of adjusting the profits. I closed the books every year during the time I was there, which would be approximately five or six times, and during that time it developed that Dan. Ross had no interest in the profits of the business of the yard.

(Witness Continuing:) These profits all went to the Bonner Mill—not directly to Henry Hammond. It developed that Henry Hammond was lessee of the Bonner Mill, and in that way the profits all went to Henry Hammond personally. At the time I turned the profits of the yard over to the Bonner Mill, I knew from Hathaway's statement to me as auditor of the company and adjusting the profits and losses of the business, that at that time Henry Hammond has a lease on the Bonner Mill. During the time I was at Missoula and at Helena, I was familiar with the market value in those yards of the sawed lumber that was being handled by them which came from the Bonner Mill. The price varied very much. We got into a fight there one time and the price ran down



(Testimony of Charles T. McCullach.)

pretty low. General prevailing market value, I think, was about \$16.00, perhaps, for common lumber per thousand feet, board measure. As to what was the reasonable market value of the lumber that came from the Bonner Mill at the town of Helena while I was there, my recollection is that we got \$23.00 a thousand foot for rough common lumber. I only quote from memory. I would not be positive as to that. I couldn't say that at that time I was familiar with the cost of sawing that lumber. I was not familiar with the cost of cutting and rafting logs from the places they were cut to the mill. [164]

Recross-examination.

The value I speak of is the retail market value. I say that sometimes it was higher and sometimes very low. We sold rough lumber there at one time as low as \$9.00 a foot at retail. I don't know of my personal knowledge about the stumpage value of the lumber during the years I was there. During the time that this lumber sold at \$9.00 a thousand, there was a fight on, or a lumber war on, between my company and other companies, and after the war ceased, the prices went up again.

**[Deposition of J. B. Seely, for Plaintiff.]**

The deposition of J. B. SEELY, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

Direct Examination.

I reside at Helena. By occupation I am a supervisor in the Forest Service of the United States. I



(Deposition of J. B. Seely.)

have resided in the State of Montana about twenty-eight years. My occupation during that time has been diversified—lumbering, a little farming, stock-raising, mercantile business, forest service. I was employed by the Hammonds in the Blackfoot River country. My work for them commenced the latter part of August or early in September in 1885. I was employed by George W. Hammond. I was at Spokane, Washington, when I was employed. The substance of my conversation with George W. Hammond when I was employed was this: He learned that I had some experience in lumbering in the East. And he met me in the Spokane Hotel; he told me that he was beginning some *some* lumbering operations in Montana and wanted me to go back with him. He did not at that time tell me whether these operations were being conducted for himself or for others; he never did at any time tell me in regard to who was managing and controlling these lumber operations. The first work [165] that I did for the Hammond outfit was at a point about six miles east of Missoula, at Bonner. At that time there was no mill there. They were then constructing a dam across the river. A man by the name of Cole had charge of that work. He seemed to be the man in the immediate supervision of the work. I don't recall that I ever saw A. B. Hammond about that work. After I had completed my work on the dam at Bonner, I went to work at a point up the Blackfoot River from Bonner, commencing operations or building camps on a little stream, a tributary of the Blackfoot, known as Fish

(Deposition of J. B. Seely.)

Creek. This camp was located on section 28, township 14 north, range 14 west. The first fall and winter we were engaged at Fish Creek camp, building camps and cutting timber, and the work incident to logging. I think it was in October, 1885, that we reached Fish Creek Camp and commenced work, and at that point and another point on the Blackfoot River it continued until February, 1889, and from there a short period of time at Bonner again, until about the first of August, 1889. This Fish Creek Camp was also known as Headquarters Camp for some time. During the time I was located at Headquarters Camp, I visited a camp that had been occupied by Eckwall, that was in the following season, and a man by the name of Cunningham had charge of it. I don't remember of meeting Eckwall, but I feel, in a general way, that such a man was operating there; it was commonly known in that vicinity as Eckwall's Camp before Cunningham went there. I could not say about what section the Eckwall-Cunningham Camp was located on. I know where the Harrington Camp was, and was there repeatedly. It was near the mouth of Elk Creek, I wouldn't name the section. It was a comparatively short distance down the river from the Fish Creek Camp. I could not name any of the sections [166] from which logging was done by Cunningham in the vicinity of the Eckwall-Cunningham Camp. I know there were logs taken from that camp and put into the Blackfoot River and they ultimately went to Bonner. There was no other mill at Bonner except the Ham-

(Deposition of J. B. Seely.)

mond Mill at that time. It would not have been practical to have floated or driven those logs, or in any other manner transport them to any other camp or sawmill than the sawmill at Bonner. I knew of the Sontag Ranch. I knew of the Hammonds logging timber cut from there and putting it into the river. I don't believe that the land lying on the east of the Sontag Ranch from the mill sloping to the west, was cut; the timber that I have in mind was adjacent, it might have included a part of the Sontag claim during the time that I have mentioned as being employed by those people. Perhaps I have in mind the timber that was cut by Boyd in there to the south and southeast of the Sontag ranch house, but that was after '89, I think, and I don't fix him with cutting in there with any certainty while I was there working. I went down the river one spring—probably it was the spring of '87. The drive was taken to Bonner and it was delivered at the Bonner Mill. After I went down the river with the drive, I remained in the employ of the Company on the Blackfoot continuously. Now, I have used the term company—we called the operations on the ground Henry Hammond's account, and during a considerable portion of the time that I have specified, I had charge, to some extent, of the books and the accounts, the log accounts was handled as the Henry Hammond log accounts for a couple of years, as I remember it, and then it was changed. After that it was called the W. H. Hammond account—the same man, as I recall it. I think the change was suggested to me



(Deposition of J. B. Seely.)

either by Henry Hammond [167] himself or George, I don't remember which. I remember when we opened up the books going back that we made the change. I don't think Mr. A. B. Hammond ever said anything to me about the accounts, or how they should be kept or entered. I don't think I ever had any conversation with Mr. A. B. Hammond in regard to the operations on the Blackfoot River during the years that I was there. I don't recall that I ever did see him about the workings or about the mill at Bonner—I don't think that I ever did. While I was employed as bookkeeper at the Headquarters Camp, I gave orders to the men that were employed about the camp for their work on the Missoula Mercantile Company. As to the method of signing those orders, for the first year and perhaps the second year, I am not sure about the second, they were signed Henry Hammond. I think later there was a change and they were signed W. H. Hammond, unless I made a mistake and forgot the name of W. H. and called it Henry. I don't recall at whose suggestion the signatures were changed, or the manner of signing those orders changed. George Hammond had charge of it; ordinarily he would be the man that would suggest it; if Henry Hammond had suggested it, why the change would have been made upon his suggestion. I don't think A. B. Hammond ever made that suggestion to me. A. B. Hammond did not at any time have any connection with the logging operations that were being conducted on the Blackfoot while I was there.



(Deposition of J. B. Seely.)

Q. To refresh your memory, Mr. Seely, do you remember of a conversation you had last winter with Mr. Ira Lantz, Special Agent of the General Land Office, at the Shepherd Hotel, Missoula, Montana?

A. Yes, sir. [168]

Q. Did you not in that conversation tell Mr. Lantz that it was at the suggestion of Mr. Hammond?

Mr. BURNETT.—Is this cross-examination?

Mr. HALL.—Yes, it is; and the record may show that.

Q. Didn't you tell Mr. Ira Lantz that the change in the signature of these orders on the Missoula Mercantile Company from Henry Hammond to W. H. Hammond was made at the suggestion of A. B. Hammond?

A. I did not, or if I did, it was not meant as A. B. Hammond.

Q. I ask you to examine the signature, J. B. Seely, at the bottom of the affidavit, which purports to have been subscribed and sworn to before E. E. Bennet, Special Agent of the General Land Office, on November 24, 1909, at Great Falls, Montana, and ask you if that is your signature. (Handing witness document.)

A. That is my signature.

(Witness Continuing:) I don't recall whether I swore to that affidavit or not.

Q. I ask you to read on the bottom, or listen while I read on the bottom of the second page, the following: "It was part of my duties as bookkeeper to draw and sign all checks in payment of wages and requis-

(Deposition of J. B. Seely.)

tions for supplies which were needed at or paid for from Headquarters Camp; the requisitions for supplies were all drawn on the Missoula Mercantile Company, and in sending the same, I signed the name of Henry or W. H. Hammond to them; the checks or orders for the payment of salaries were drawn on the Missoula Mercantile Company, [169] and in the beginning I signed them with the name of Henry Hammond, but on the suggestion of A. B. Hammond to me, I changed the form of the signature, and thereafter signed them W. H. Hammond." You have read that statement that I have just read, have you not?     A. Just now I have.

Q. It is incorporated in your affidavit made before Mr. Bennet on November 24, 1909?

A. The paper itself is the best record; I don't see any date.

Q. I will ask you to examine the jurat attached there by E. E. Bennet, Special Agent, of the General Land Office, which says, "Subscribed and sworn to before me this 24th day of November, 1909, at Great Falls, Montana." You saw that affidavit, did you not?     A. Yes, sir.

(Witness Continuing:) The only way I can reconcile the statements made in this affidavit before Mr. Bennet and my statements made on the witness-stand in regard to the change of the signatures on these orders on the Missoula Mercantile Company, is that I did not compare the affidavit as closely as I should have read it, because what was true then is true now, and as I have testified, I can-

(Deposition of J. B. Seely.)

not fix any time when A. B. Hammond did tell me to do that. And I now desire to testify that what I am stating before the notary at this time is true.

Q. Did not Mr. Lantz in his conversation with you last winter in the Shepherd Hotel in Missoula also ask you about the change in the signatures on the orders of the Missoula Mercantile Company, and whether or not Mr. A. B. [170] Hammond directed that the change be made?

A. My talk with Mr. Lantz at the Shepherd Hotel at Missoula, a considerable part of it, was without knowing who he was or what was his business; he recited things that occurred a long time before, and exactly what he stated I don't know now, but my reply was that it was a long time ago, and I didn't remember it, and then he told me who he was, what his business was, and I wouldn't undertake to say at this time what he said, or what I said in that conversation.

Q. In other words, you might have told him in that conversation the same thing that was made in this affidavit before Mr. Bennet? A. I might.

Q. Would it have made any difference—

A. I want to qualify that, if I did, I don't believe it was true.

Q. Would it have made any difference to you, Mr. Seely, if Mr. Lantz had disclosed who he was when you first commenced to talk to him?

A. Only this, that I would have been more careful in statements if I had thought of anything other than a discussion of old times in Montana.



(Deposition of J. B. Seely.)

(Witness Continuing:) I now want to be understood as saying that if I did make such statements in that affidavit to Mr. Bennet, and in my conversation with Mr. Lantz, in regard to the directions from A. B. Hammond, about the orders on the Missoula Mercantile Company, that such statements are not correct, and that the testimony I have given here this morning is correct. [171]

Cross-examination.

This affidavit, a portion of which has been read to me, was not written out by me in long hand, first of all, and I didn't write it out on the typewriter. The only talk or discussion of this matter that I had with anybody was with this gentleman here at Missoula, last January. This affidavit, as I recall it, was brought to my office at Great Falls, to my desk, and I think there is where I signed it. I had forgotten having made it even, until it was called to my attention just a few minutes ago. I don't remember having had another talk with somebody before my talk with Mr. Lantz last January, I think, in Missoula, even although this affidavit was made in November, 1909. When this affidavit was brought to me, I don't think I observed the difference in initials between A. B. Hammond and W. H. Hammond, in reference to the matter, or else I would not have signed it. I recall the Edgar claim. I was intimately acquainted with Mr. Edgar. I had known him before I went up there. The Fish Creek Camp was close to Mr. Edgar's claim, would judge around near 100 rods, might have been a little more than that or a little less.



(Deposition of J. B. Seely.)

(The witness was here made defendant's witness as to his testimony concerning the Edgar claim, improvements and cultivation thereof.)

In October, 1885, when I was there there may or may not have been improvements when we arrived there, but there was shortly afterwards. Before Christmas, 1885, there were improvements there—there were buildings consisting of a log house or cabin or camp, and a stable or barn of logs. I didn't have any occasion to visit Henry F. Edgar on that claim during the years '85 and '86. I don't recall having visited him. I think in the spring and early summer of '86, there was some cultivation around the Edgar cabin; I think there was a sort of garden there, little cultivation in the nature of a garden, as I recall it. At [172] a later date up there, say in '87 and '88, I do not recall the condition of the improvements on the Edgar claim. I recall the character of the land in the Edgar claim as viewed from the standpoint of a farmer. I think it was very fair agricultural land, that is, the soil was good as to its character and moisture, particularly where his buildings were located.

Q. Could you describe the topography, where his buildings were situated and the rest of the claim?

A. I could describe the topography of the land where his buildings were, but whether it would be entirely within the boundary lines of his claim, I wouldn't undertake to say. The land there consisted of benches; there is a flat tract of land from the Blackfoot River, and a bench rising on another flat.

(Deposition of J. B. Seely.)

plateau or level tract of land, and then another somewhat abrupt rise, sort of a terrace, and Edgar was on this second bench, as I remember it, and a little stream we called Little Fish Creek.

I have had considerable experience in farming, some of it in Montana, and from my experience as a farmer, I would say that the Edgar claim was susceptible of making a home. I was around about the Edgar claim when I was working for the people that maintained the mill at Bonner nearly four years, and for a number of years afterwards. During that period of four years from October, 1885, I had that familiarity with the claim of Mr. Edgar that a man would acquire by passing over it frequently, without extensive examination of it. I do not recall during that period as to the character of cultivation on the claim. I think Edgar had some horses and I think a few head of cattle, milk cows. I know of my own [173] knowledge of camps that I worked at after October, 1885, along the Blackfoot River that were supplied with vegetables. In a general way I know where most of them came from, they were purchased of the settlers on the river, a German up above named Sontag; bought some of him, and Warner's. I would not say whether we did or did not buy vegetables that came from Mr. Edgar's claim. I think there were vegetables raised on that Edgar claim after October, 1885, while I was there during the next two or three years, but it is only an impression, sort of a hazy recollection. Mr. and Mrs. Edgar, and Mr. Edgar's stepson, a man named

(Deposition of J. B. Seely.)

Foster, were the occupants of the Edgar claim from October, 1885, I think for the next three years or so. As to the period of time that I recall seeing them on that claim, I think he was there continuously from about the time we went there in '85, I would think three years, for quite a period of time anyhow, I remember his being there or understood he lived there. As to the extent the timber had been felled on the *Eddy* claim when we first arrived in its vicinity in October, 1885, I do not know; but Mr. Edgar was logging there, cutting timber there to some extent that winter. As to whether timber was being cut on the Edgar claim during the summer of '86, there were logs skidded on the ground, on the claim, in the summer of '86. That recalls to me what I overlooked before. There was a period from the spring of 1886 to perhaps three or four months when I was not in the employ of the Company.

#### Redirect Examination.

I think Mr. Edgar was doing the logging off the Edgar claim. The method of his logging showed inexperience, but I did not question then, and don't now, but that he was cutting this into timber for merchantable timber. I [174] never heard any statement made by W. H. Hammond or Henry Hammond in regard to what interest he had in the Edgar claim. I don't know that I ever heard any statement by George Hammond as to the interest that the Hammond outfit had in the logs on the Edgar claim, but I knew in a general way that they were going to the Bonner Mill, that is, going to the river; that is, all



(Deposition of J. B. Seely.)

the logs that came off of there. I don't remember this man Bennet. I don't recall where or when I met him. The signature to the affidavit is mine, and his name is subscribed to it there. I don't place the man now, I don't recall him, only I do know that a man came in there to my office and asked me to make an affidavit; I looked that over and I have no doubt but what that was Mr. Bennet at that time. I don't think he could have prepared an affidavit without having talked to me; but all that I can recall now is that he just came in and presented this affidavit, and asked me to sign it. I had forgotten it, until I saw it here, that it had ever been made.

Q. Does not that seem a little peculiar to you, that a man would present an affidavit without having talked to you?

A. I don't think that he could, or he would, and I presume that he did first talk with me, or else I wouldn't have made the affidavit if it had been brought up to me in some way so that I didn't question it. My signature is evidence that I did not question it at the time I signed it.

Recross-examination.

Q. You have stated that you didn't have any doubt then, or don't have any doubt now, that Mr. Edgar was taking the timber off of his claim for the sake of timber, or something like that? [175]

A. Yes, sir.

Q. Now, would the claim have shown any different manner of having the timber taken off of it if Mr.



(Deposition of J. B. Seely.)

Edgar had in view the clearing of his claim for farming or pasturing purposes?

A. The operation would have been practically the same.

**[Deposition of Thomas G. Hathaway, for Plaintiff.]**

The deposition of THOMAS G. HATHAWAY, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

Direct Examination.

I reside at Missoula, Montana, and am sixty-seven years past. I have no occupation. I came here in 1878. For the first three years after I came here, I was bookkeeper for Eddy-Hammond & Company.

Q. Was the Eddy-Hammond Company, the firm of Eddy-Hammond & Company, a copartnership or a corporation?

A. I think—I don't know—there was stock issued, I think it was a copartnership—because I never knew of any stock being issued; I remember A. B. Hammond and R. A. Eddy and E. L. Bonner—however, E. L. Bonner owned the half—about the time I came, and R. A. Eddy about a third and that would make a sixth for A. B. Hammond.

(Witness Continuing:.) I worked for Eddy-Hammond & Company from 1878 until 1882. The copartnership was in existence when I first commenced to work for them in 1878. As to who was in the active *and* control of the firm of Eddy-Hammond & Company during the period from 1878 until 1882, A. B. Hammond was there most of the time, R. A. Eddy at

(Deposition of Thomas G. Hathaway.)

that time was away—when I first came here—when I first came here E. L. Bonner resided in [176] Deer Lodge. I kept the books of Eddy-Hammond & Company; at that time it was an awful small outfit. There were only two clerks of us. I worked in the store in the daytime, and at night-time I used to post the books; and business then didn't amount to much, only where they used to have our rush, which was Sundays, that was the great day, they come in from church, something like that, and I slept in the store, and so did the other fellow—there was two of us.

Q. Who gave you your directions and orders about your work in the store and on the books?

A. Well, A. B. Hammond was there, and he was the boss at that time.

Q. How long did Mr. Hammond continue to be in the active management of the firm of Eddy-Hammond & Company?

A. Well, it was like this, when he was there he had charge of the store, as I said, and Eddy, when I first came, was away in California, and when Eddy come back, why, Hammond knew more about the business than anybody else, except perhaps myself, and when I kept the books, you know, I was cognizant of all that was going on, and who owed, and everything. There used to come a man from Deer Lodge, by the name of Robinson, to check us up, look over all accounts, sent by Mr. E. L. Bonner, who was the biggest stockholder.

(Witness Continuing:) As to when the firm of Eddy-Hammond & Company commenced to engage

(Deposition of Thomas G. Hathaway.)

in lumbering in the State of Montana, it might have been 1881. Now, I think it is 1881, or 1882, I think they then had the first notice that the Northern Pacific expected to build through this country, and Mr. Bonner had got from the Northern Pacific a railroad contract for cutting square [177] timbers, getting out piling and ties, and cutting bridge material, and there was mills put in to get that; one was put up here at a place called Wallace, and it was then Clinton afterwards, by a man named Joseph Kitchen; there was another put in afterwards, I cannot give you exactly the time, this was thirty-odd years ago, and there was another put in by a man named Stephens—I think his name was Stephens—down to what is right below Thompson Falls, afterwards bought by a man named Allen, and these mills they cut timber for the construction of the Northern Pacific. They all cut timber and guard rails, and bridge ties, and stuff like that. I knew of a mill that was situated near what is now the town of Bonita, Montana, that was called the Fenwick Mill. That mill was established or set near Bonita somewhere about '85. I don't know the man's name that built the mill at Bonita, but the man that looked after it, who was in charge, was E. A. Eddy.

Q. My question may be a little leading. What firm or what company owned the mill at that time, and paid for its erection?

A. The mill was run by F. A. Hammond who owned the mill. The mill originally belonged to a man named Allen; he bought it from this man Stephens,



(Deposition of Thomas G. Hathaway.)

I think then it was moved, Wilcox and Stephens, then the mill was moved from near Thompson Falls and erected. I know that Mr. Eddy was up there and looking after the erection of the mill.

Q. Do you know whether or not he did that for Mr. Fred Hammond, or for the firm of Eddy-Hammond & Company?

A. All I know—he done that for the firm—I don't know, that was my understanding of it, and the mill was sold [178] to F. A. Hammond by Eddy-Hammond & Company.

(Witness Continuing:) I think Fred A. Hammond continued to run that Bonita Mill something over a year and then he sold out to George W. Fenwick. George W. Fenwick was a brother-in-law of Mr. Henry Hammond; he married Mr. Henry Hammond's sister; he was a brother-in-law of A. B. Hammond. I was going to say Mr. Fenwick was up there, had been looking after the lumber and knew the situation better than anybody else. He knew what was required and he was an educated man. Mr. Fenwick run the Bonita Mill, it must have been fully three years, or perhaps more. When Mr. Fenwick ceased to operate the mill, it was discontinued as a mill. I think some of the old machinery is there yet. I know of nobody operating there in that particular vicinity but there was about ten or twelve mills right near around there, but not in that spot.

Q. What connection or relation did Mr. A. B. Hammond have with the mill during the time that it was run by Mr. Fred A. Hammond?



(Deposition of Thomas G. Hathaway.)

A. Well, at the time Fred A. Hammond run the mill he had a contract from us, and we handled his lumber.

Q. That is for the firm of Eddy-Hammond & Company?     A. No, sir.

Q. For the Montana Improvement Company?

A. For the Montana Improvement Company.

(Witness Continuing:) The Montana Improvement Company was a corporation; I don't remember who all the stockholders of that company were, but I know some of them; there was E. L. Bonner and R. A. Eddy and A. B. Hammond, and I also had a little stock; [179] I was an officer, they had to give me stock to be connected with the company. The records of the State of Montana show that the Montana Improvement Company was incorporated August 1, 1882. The railroad had not got through, but then we had furnished all the material for the railroad, and we had all this side lumber to dispose of. The firm of Eddy-Hammond & Company was engaged mostly in a general mercantile business in the town of Missoula. The Montana Improvement Company was a separate and distinct entity from Eddy-Hammond & Company. It was a corporation. As to the purpose for which the Montana Improvement Company was incorporated, Eddy-Hammond & Company, after the railroad contract was accomplished, had all this side lumber on hand and incorporated this company to handle that side lumber and to do that, we had to get another way to contract with, and we went into the business; it was a helper

(Deposition of Thomas G. Hathaway.)

really to Eddy-Hammond & Company to have that company. As to its being a subsidiary or co-ordinate company with Eddy-Hammond & Company, it was entirely distinct at the time. By their being stockholders in both, I suppose they had the benefit of the particular trade for that company.

Q. Could you say that the Montana Improvement Company handled all of the lumber that was cut by Fred A. Hammond and by George W. Fenwick at the Bonita Mill?

A. Well, I don't know about George W. Fenwick now, because we went out of existence before George W. Fenwick—

Q. Came into existence?

A. No, sir, pretty near the same time, I think. I cannot tell the date, you know, it is a long time ago, I cannot remember. [180]

(Witness Continuing:) The Montana Improvement Company handled a portion of the lumber that was cut at the Bonita Mill by Fred A. Hammond, at least I think we did, because I know at that time—let me see, that was in '85,—'86, I think the Government got after us, and we had an inkling of it in '85, because those fellows all the time were quizzing me. As to whether there was a written contract between Fred A. Hammond and Montana Improvement Company for the handling of the lumber from the Bonita Mill, that I cannot say, but I think there was because I know that we afterwards—we always did make contracts for the mills. As to the substance of the contract between Fred A. Hammond and the Mon-

(Deposition of Thomas G. Hathaway.)

tana Improvement Company for the handling of the product of the Bonita Mills, then owned by Fred A. Hammond, I don't know whether it was—I don't recollect about the contract, but I can tell you this; I was on the road selling this lumber; I wasn't here but very little of the time, in fact, when that company was started it was my duty to go out and unload that lumber, and to do so, we had to establish lumber yards, and it took me a great deal of time; they were at different places, and I had to order such stock as I thought was necessary to stock up with for that particular yard, and we started yards in different sections of the country. I wasn't here very much, in fact, I was away most of the time, but I know this, that we bought lumber just as cheap as we could manufacture, so I feel nobody made a contract.

Q. Now, do you know of your own knowledge whether or not the product of the Fred Hammond Mill at Bonita was turned over to you during those years, to the Montana Improvement [181] Company?

A. Some of it, yes, there must have been, because it was in existence then, and we handled the lumber, how much I cannot say.

Q. And during those years that the Montana Improvement Company was receiving lumber from the Fred Hammond Mill, who was in charge and in active control of the business of the Montana Improvement Company?     A. You mean the officers?

Q. Officers, yes.



(Deposition of Thomas G. Hathaway.)

A. E. L. Bonner was the president of the company, R. A. Eddy was vice-president and A. B. Hammond was general manager, I think, I was assistant manager.

Q. Well, what was Mr. A. B. Hammond's duty in regard to the management of the Montana Improvement Company?

A. His duties, like that of any other manager.

Q. Was he, or was he not, in personal charge and supervision of the business of the Montana Improvement Company?

A. Well, no, sir, he was not, that is to say, personally there?

Q. Yes.

A. I knew more about the business than anybody, in fact, I took the inventory and handled the stock and he sent me out to sell it; I would go out and sell it and send the orders in and the orders came in, the office was right there, and he was here in town. The Mercantile Company was doing a big business and he used to attend to it a part of the time. He would certainly look after it a part of the time, I suppose, but the contracts they would take care of themselves.

Q. That is, he looked after the business of the Montana [182] Improvement Company part of the time?

A. He had an independent bookkeeper.

Q. From whom did you receive your orders?

A. I looked to him.

Q. To A. B. Hammond?

A. That is, for the orders of the business I con-



(Deposition of Thomas G. Hathaway.)

sulted with him; he was my manager, I was assistant.

(Witness Continuing:) As to whether or not A. B. Hammond had any personal interest in the mill at Bonita during the time it was under the management and control of Fred A. Hammond, I don't think he had, because Fred A. Hammond sold his interest to George W. Fenwick—sold out—I know that myself, because I took the inventory of the stock. I don't think A. B. Hammond had any interest in that mill after George W. Fenwick bought it of Fred A. Hammond. We handled the product of the mill after Fenwick purchased it of Fred A. Hammond; that is, I don't know whether it was after the time the Montana Improvement Company was in existence, the dates were very close there—I think it was the Big Blackfoot Milling and Manufacturing Company that handled the biggest part of the output of that mill.

Q. Now, to refresh your memory a little; the records of the State of Montana show that the name of this corporation was the Blackfoot Milling and Manufacturing Company? A. Yes, sir.

Q. And it was organized on January 22, 1888?

A. Yes, sir.

Q. Then evidently the Montana Improvement Company continued from August 1, 1882 to January 26, 1888?

A. Well, we stopped, the Government was after us, [183] we stopped.

Q. When did the Montana Improvement Company

(Deposition of Thomas G. Hathaway.)

then cease to handle any of the products of the Fenwick Mill?

A. Well, after we knew that they were suing us, we couldn't continue that kind of business, we stopped—I think the date would show that the suits were brought. I can't say exactly; I went to work in 1887 and contracted and worked separately on this Bitter Root road myself. I built ten miles of that Bitter Root road.

Q. And your relations with the Montana Improvement Company ceased in 1887?

A. I never got any wages from them. I went out on that road and I worked. I had a contract. It would show on the records.

Q. After the Montana Improvement Company commenced to handle the product of the Fenwick Mill, how long did the Fenwick Mill continue in existence?

A. I cannot tell exactly. We had an awful long period of dull times; lumber was low and the prices had gone down, you know, and there was not much, very much, doing at it.

Q. Did the Fenwick Mill cease to operate about the time suits were started against the Montana Improvement Company?

A. They run after that; that was an independent mill.

Q. Can you tell how long Fenwick continued to operate that mill on section 14, near Bonita?

A. I cannot say positively; let me see. I cannot tell; I have forgotten the date.

(Deposition of Thomas G. Hathaway.)

Q. Did the Montana Improvement Company, or Eddy-Hammond & Company, or the Missoula Mercantile Company, or any [184] company, firm or corporation with which A. B. Hammond was connected continue to receive the product from the Fred Hammond Mill at Bonita up until the time it ceased to operate?

A. We took the product of the mill, that is, one of the companies I was connected with.

(Witness Continuing:) As to all of these companies that I was connected with, A. B. Hammond was also connected as a stockholder, or otherwise, I am familiar with the mill known as the Bonner Mill, at the town of Bonner, Montana. I think that mill was started to be built in 1885 by W. H. Hammond. I don't believe that A. B. Hammond had any interest in the Bonner Mill at the time it was erected from the fact that Henry Hammond had bought the site there from a man named Hiram Farr, and he erected the mill. Henry Hammond was a man of means at that time. As to whether he borrowed any money from A. B. Hammond to use in the construction of that mill, or from any of the corporations, firms or copartnerships with which A. B. Hammond was then associated, I cannot say. The accounts were not under my supervision. I know this, that Henry Hammond was a contractor at the time. He had a subcontract from Eddy-Hammond to clear a right of way and do other work down here on this Northern Pacific when it was being built, and he made considerable money, and he brought into the country.



(Deposition of Thomas G. Hathaway.)

considerable money—he was a contractor on the Coast. How much money he had, I cannot say, but I do know that he built the mill. He can tell you himself, he is here present. I cannot say, I didn't keep the books of the Mercantile Company. As to how long Henry Hammond continued to own and operate the Bonner Mill on the Farr Mill Site, Henry Hammond started to build the mill in 1885, to my memory, the [185] next year part of the dam went out and retarded the operation; they couldn't hold the logs without they had a dam in there and they didn't do very much; they had to replace that dam, and I don't think he done very much the next year—that was the year 1886, and then after the mill was built, as my memory is, he sold his mill to what was called the Big Blackfoot Milling and Manufacturing Company, took a lease. The lease, I don't know if it is recorded or not; he is here, he can tell you, I don't know about that. Then he operated the mill, and whatever he could make out of the mill was his, over and above what he paid for the lease, and his lease, I forget exactly, I think he had only a short lease, two years or something, and then afterwards the new company was taken over, the Big Blackfoot Milling Company, when his lease expired.

Q. I believe the correct name of that first corporation was the Big Blackfoot Milling and Manufacturing Company?

A. Yes. You spoke to me the other night about the Big Blackfoot Mill Company, I don't know any-



(Deposition of Thomas G. Hathaway.)

thing about that.

Q. It was never a corporation that was mixed up in any of these lumber operations that we know of?

A. No, sir, not a thing.

Q. Now, then, after the lease to Henry Hammond expired, how long did the Blackfoot Milling and Manufacturing Company operate the Bonner Mill?

A. Let me see—that would be—he had a lease starting in '85; I don't know whether the lease was signed or not, I don't know whether the new company—I think I can tell—just about that time the new company was formed, anyway about the time his lease expired, I wouldn't say positively. [186]

(Witness Continuing:) The company took over the Bonner Mill and ran it. I think Henry Hammond was president of the new company, but I am not sure. He was manager anyway. As to whether the mill was operated by the corporation itself or by Henry Hammond under a lease, first Henry Hammond had it under a lease, whatever profit he made was his; afterward when it was taken over, Henry Hammond had the management of it, and I worked under him, he and I run the mill; that is, he manufactured lumber and he had me sell it; I sold it or tried to sell it. A. B. Hammond was connected as a stockholder with the Blackfoot Milling and Manufacturing Company during the time Henry Hammond was in active management of the manufacturing end; E. L. Bonner was a stockholder; there was four stockholders about equal; there was Henry Hammond, R. A. Eddy, E. L. Bonner and A. B. Ham-

(Deposition of Thomas G. Hathaway.)

mond, and about that time I made a little money on this contract in the Bitter Root, and I put what little money I had in the stock. They had given me some stock; I think McLeod had some; there were some others, but the principal stockholders were A. B. Hammond, R. A. Eddy, W. H. Hammond and E. L. Bonner. W. H. Hammond and Henry Hammond is the same thing. From my memory, Henry Hammond disposed of the product of the Bonner Mill during the time he managed it. There is one thing I want to say here about what I gave in testimony there—I find this—about the time that the Government got after us and about the time, it was in '86, these mills, I made a statement that I want to correct there. They made their contracts for their mining timbers direct with the mines. They were cutting some timber on unsurveyed lands; the lands of this country were not surveyed and Mr. Fenwick, I know myself, had a contract direct with the Anaconda Company; [187] now that is of record and can be shown. I don't know where that contract is because I have not seen it. Mr. Henry Hammond called my attention to this since we adjourned from the other room into this one—I had forgotten about it. But it is a fact, I remember distinctly about it now, but it has been so long ago that a person cannot remember everything.

Q. Let us go back to the Blackfoot Milling and Manufacturing Company. After the company itself took charge and commenced to operate the mill at Bonner, how was the product of that mill disposed

(Deposition of Thomas G. Hathaway.)

of? A. After the—

Q. After Henry Hammond's lease expired and the company itself took charge of the Bonner Mill?

A. Oh, we sold that, I went out and sold the lumber.

(Witness Continuing:) When I say "we," I mean Henry Hammond and I. I would consult with him about the prices; the prices were low, and it was a pretty hard uphill job, because this country, after the railroad was completed, we had to compete with a whole lot of little mills that went up and they had nice little settings around the track, and our company was paying a stumpage for the lumber that they got off of the railroad land; the only thing that allowed us to compete was our location being near the market.

Q. Who received the profit, if any?

A. Oh, the company, they owned the mill, and they received the profits.

Q. That is, the Blackfoot Milling and Manufacturing Company?

A. The Blackfoot Milling Company was the last one. [188]

Q. That was the last one, the last Company?

A. Yes, sir.

Q. I call your attention, to refresh your memory, to the records of the State of Montana, which show that the Big Blackfoot Milling Company was organized on November 14, 1891. Now—(interruption).

A. Henry Hammond's lease run, I think, it was two years, with the privilege of one; I don't know



(Deposition of Thomas G. Hathaway.)

exactly how long he had it. The mill was started to be built in 1885.

(Witness Continuing:) It would seem as though there was a short period between the time that the Henry Hammond lease ceased to exist and the organization of the Big Blackfoot Milling Company in 1891, when the mill was run and operated by the Blackfoot Milling and Manufacturing Company. It seems to me that after the formation of the Big Blackfoot Milling Company, on November 14, 1891, there was a change in the officers; I think McLeod was president, or something, I am not sure; there was not the same officers; I don't believe. A. B. Hammond had an interest in the Big Blackfoot Milling Company. He was always an active stockholder, and he would certainly have some say with the management or directing the officers of the company after its organization in 1891, but he was not the manager at that time.

Q. Do you know of any contract between Henry Hammond on one side and A. B. Hammond, or any of the corporations or partnerships with which A. B. Hammond was in control?

A. He was not in control.

Q. Or in which he had an interest, by which A. B. Hammond, or any of the corporations or copartnerships in which he was interested received any of the profit that was derived [189] from the operations of the Bonner Mill during the time that it was under lease by Henry Hammond?

A. Henry Hammond, my understanding was that



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all he made over the amount he paid for the lease was his; that the amount he paid for his lease went to the stockholders of the Big Blackfoot Milling and Manufacturing Company.

Q. Did the amount that went to the stockholders of the Blackfoot Milling and Manufacturing Company from the lease given to Henry Hammond depend upon the amount of timber that was sawed by Henry Hammond at the Bonner Mill, or was the rate a flat fixed rental?

A. My recollection of it is, it was a flat rental. He paid so much a year, how much I cannot say.

Q. And that amount was not dependent in anywise upon the amount of timber that was cut or sawed by Henry Hammond?

A. He took his chances when he paid his rent.

Q. Now, do you know whether or not A. B. Hammond derived any profit or participated in any profits that Henry Hammond made from the mill during the time that he had it under his lease?

A. I don't believe he did. I don't know anything about it; anyway, it would be a matter between him and Henry Hammond.

(Witness Continuing:) As to when I severed my connection with the Big Blackfoot Milling Company, we sold out to the Anaconda Company, I think, in July. I was taking stock in 1898, about the first of August, but the understanding was that we would stay for a time there and post the incoming men about the business, and [190] in October I became dissatisfied with the new management and I

(Deposition of Thomas G. Hathaway.)

asked a leave, and I guess likely they were willing for me to leave. They sent a man with me and I went over the country. I tried to tell all I knew about the different charges. We had different charges and different prices, and I showed him what he had to go up against. They sent a man by the name of Griffin. I left the company in 1898. Henry Hammond stayed on and continued there. As to the yards I have testified to and their first establishment, when the railroad got through, we found it necessary to handle the lumber, to place it on the market. Where it would be advisable to start a yard, we started one. We started one in Missoula, one in Helena, one in Deer Lodge, one in Spokane, one in Cheney. In Brockton, we interested a man, that is, carried him; he got paid for it.

Q. How were the accounts between the various yards that you have mentioned, and the parent company carried?

A. Well, at first we kept a set of books there and charged them up with the lumber that we shipped them. I was on the road selling, not only to our yards but to little towns where it was not worth to establish yards, would not warrant it.

Q. Were the consignments of lumber charged to any particular individual who might happen to be in charge of the local yards?

A. No. It was charged up to the yard, to the Helena Lumber Company, the Deer Lodge yard, or the Missoula yard; I don't know whether the Mis-

(Deposition of Thomas G. Hathaway.)

soula yard had been established at that time, though I think it was.

Q. It was merely carried as a branch of the parent company and not as a distinct corporation or firm or individual? [191]

A. The Helena yard was run by—Mr. Bonner had a relative named Edgar and he with a practical man by the name of Hartwell—Hartwell and Edgar was the name of that company; we sold to them direct; the Deer Lodge yard was Bonner's own yard; that was ordered by him direct and charged to him direct; the Missoula yard, I think, was started by a man by the name of Rutherford. I don't know whether they had it there or not, I can't exactly recall, but Rutherford, I think Clements, if you will let me, I can ask Henry Hammond, he perhaps could refresh my memory.

Q. No, you can answer it.

A. Wilcox was one of the men that run the Cheney yard, and he run it, it was just the same like selling to themselves, like he was to do the business, do all the business he could and that applied to the Spokane yard.

Q. Now, you have mentioned the fact that Fenwick had a contract direct with some of the mills or mines at Anaconda for furnishing them lumber?

A. Now, here, Mr. Fenwick had his contract direct, he billed direct to these yards. My understanding of that there was on unsurveyed lands and the company couldn't handle it, and that is the way it was run there up the Bitter Root, though those



(Deposition of Thomas G. Hathaway.)

people only handled through our company because it was land that they had title to.

Q. Did the Blackfoot Milling and Manufacturing Company and the Blackfoot Milling Company handle all the lumber that was cut up in the Big Blackfoot country?

A. The Blackfoot Milling and Manufacturing Company?

Q. Yes, and the Blackfoot Milling Company?

A. Henry Hammond had his billed direct to him, from memory [192] after we got charge of it, it was ours.

Q. Now, did you ever see any of those contracts between Fenwick and the mines in Butte?

A. I knew of them being in existence, possibly may have seen them. I tell you, I was on the road most all the time. My business was such that, although I lived here and had a family here, I was on the road seeking an outlet for this lumber.

(Witness Continuing:) I knew that those contracts between Fenwick and the mines were in existence. As to the stock book, the minute-book, the general books of accounts and contracts of the Montana Improvement Company, as I said before I was the traveling man, assistant manager, but I was traveling and away, and I didn't keep the books. The last I saw of them was in the office of the Montana Improvement Company. That office was located in a portion of what is now the Missoula Mercantile Company's office. The last time I saw the books, they were in charge of a man by the name of E. A. Winstanley.



(Deposition of Thomas G. Hathaway.)

I think he was the man who kept the books. Winstanley is dead. He is a man that is well known here. The last time I knew anything about the books, I think Winstanley was in charge of them. The last time I knew anything about the books, E. L. Bonner was president and A. B. Hammond was general manager, and I was assistant manager. The last I ever saw of them they were in the place of business now occupied by the Missoula Mercantile Company.

Q. And who was in charge of the books of the Missoula Mercantile Company at that time?

A. Well, the Missoula Mercantile Company was; [193] Mr. C. H. McLeod was in charge of the Missoula Mercantile Company because A. B. Hammond was away a good deal, not at that time—I think—or A. B. Hammond you might say was the—and McLeod was his assistant manager, that was in about '86 or '87, along there. A. B. Hammond, then, I suppose was the manager really, the head man of the Missoula Mercantile Company's management.

Q. How long did C. H. McLeod continue in charge of the office of the Missoula Mercantile Company?

A. McLeod was virtually in charge of the company for many years; A. B., after '88 or '89, left and was away on the coast, you know.

(Witness Continuing:) I do not know what became of the books of the Blackfoot Milling and Manufacturing Company and the Big Blackfoot Milling Company. I didn't have anything to do with these books. I was on the outside, but I seen them, and

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when we sold out to Daly, and we took our inventory, you know, I worked for them a couple of months afterwards and Henry Hammond had the Blackfoot Company's books up there at his mill, you see. I don't think the old books of the Blackfoot Milling and Manufacturing Company were kept at Bonner. I think they were kept down here in the office of the Missoula Mercantile Company. That is my recollection. The last time I knew anything of them, Winstanley and a nephew of mine, who is now living in Seattle, had charge of them. George W. Fenwick is still alive and lives at Eureka, California, the last I knew of him. Fred A. Hammond is dead. George H. Hammond is dead. The Montana Improvement Company finally went out of existence when the Government got after us. I don't know whether we maintained a nominal existence [194] up until 1897; I don't think so; they never done any business to speak of after the Government got after us.

Q. I find from an examination of the records of the County Recorder of Missoula County, Montana, that on September 18, 1897, you as one of the trustees signed an annual statement to the Montana Improvement Company, showing that the capital stock was fully paid up, \$2,000,000.00, there were no existing debts, on September 18, 1897, and to which you made an affidavit before George R. Ogden, a notary public, as president of the company. Do you remember making those annual statements?

A. Well, if it is of record, I must have made them,

(Deposition of Thomas G. Hathaway.)

but we didn't do any business, you see, the Government got after us and we closed out our business, and incorporated into another company.

Q. Was the property of the Montana Improvement Company and its assets transferred to the Blackfoot Milling and Manufacturing Company?

A. I think that after we got through paying all those law bills, there wasn't so very much, I don't know; I don't remember about that.

Q. Well, this may be leading, but with the gentleman's objection, I will ask you, is it or is it not a fact that the transition from the Montana Improvement Company to the Blackfoot Milling and Manufacturing Company was in fact merely a change in name of the same corporation?

A. I don't quite understand your question. What are you trying to get at?

Q. I am trying to get at this, that in effect and in fact the same people who controlled the Montana Improvement [195] Company merely organized a new company to carry on the same business, in the same way, and it was not a distinct corporation composed of different stockholders and transacting a different and distinct business from the transacted by the Montana Improvement Company?

A. They was not the same stockholders; I know they were some of the stockholders; the Montana Improvement Company had stockholders that wasn't in the other company.

Q. Wasn't it in effect a continuation of the old business under a new corporation?



(Deposition of Thomas G. Hathaway.)

A. There was certainly some of the same stockholders in the new company.

Q. And didn't they carry on the same general line of business as the old company?

A. Yes, they carried on the lumber business.

(Witness Continuing:) I was familiar with the kind of lumber that was being cut at Bonita Mill, from the time that it was established in 1885 up until it ceased to be operated by George W. Fenwick, and I was familiar with the market value of such lumber in that vicinity during that time.

Q. What was the fair market value of the lumber that was being cut at the Bonita Mill during the time it was operated by Fred A. Hammond and during the time it was operated by George W. Fenwick?

A. You want to know about the price?

Q. Yes, about the price.

A. During the railroad construction—I will have to get ahead to show you through here, the price was pretty high. The price paid by the railroad to Eddy-Hammond & Company for the bridge timbers was about \$14.00 per thousand, board feet. After [196] the railroad was completed, all the people engaged in the railroad construction left the country and things flattened out here and prices went down; the prices at first after the railroad was completed got to about \$7.50, and \$8.00 a thousand was a fair price at that time for common lumber. Our people who were engaged in lumbering in this country at that time had not any facilities to work up their uppers; they come in here in great numbers because



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the country was unsurveyed; they got settings all along the line; they cut lumber pretty cheap; stumpage cost them nothing and there was an over-supply, and prices went down, and at about the time Fenwick started it fell to \$6.00 and \$7.00 a thousand; that was a fair price to be gotten at that mill and the mines bought lumber, we had contracts even where men paid stumpage in the Bitter Root Valley, and I bought lumber as low as \$5.50 f. o. b. cars direct from the mill.

Q. Were you familiar with the fair market value of lumber that was cut by the Bonner Mill during the time it was operated by Henry Hammond under a lease?

A. The prices at that time, as I said before, just after the construction, was a little better; they got about \$7.50, or \$8.00 for common lumber, and then they installed machinery there; worked up their uppers, sold flooring and got a fair price for it; then Henry Hammond made a little money, but the prices kept going down, so many new mills going in.

(Witness Continuing:) \$5.50 is the lowest I bought at, although I have known lumber that was sold cheaper, but the contract was \$5.50, I know that for a fact. This was for mining timbers. The price that I have given, it was all the way in lengths from 12 to 20 feet— [197] ordinary length. There was no variations in the price as to the length of the timber, unless it got too long length; the length required for mining timbers was 16 ft. They liked that the best, although they could use any length.

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The timbers are not cut as short as 10 ft., unless it is defective, but 12 to 20 ft. was the ordinary length, the same price.

Cross-examination.

As to the market price of lumber from November, 1891, when the Big Blackfoot Milling Company was incorporated, until, say, January 1, 1895, common lumber was sold in the lumber-yards around Missoula at \$10.00 a thousand; it cost to bring it at least \$1.00 to \$1.50 to receive it there, and so much for piling it, and then you have to deliver it, and lumber at that time was very low; on the country along the track, there were lots of sawmills in them days; they was looking out for trade, and competition was strong, and the price of lumber was low; there was no money made those times and wages was down; that was the only thing that helped us out. Conditions in 1893 and 1894 were such that we didn't make any money on our lumber then. A great many of the sawmills that had contracted with us and was sawing independent, went broke at that time. After Uncle Sam got after them for cutting on the unsurveyed lands, the mills that went in and had to pay stumpage couldn't make a bean, couldn't make a dollar, and the lumber business was demoralized, and it was awful hard times to this country. There was not much substantial betterment of conditions before January, 1895. There was hard times here; the lumber business was in bad shape, and the supply exceeded the demand, and it was hard to unload; the country at

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that time was in a bad state; the prices were low; in fact, I have known of lumber to sell as low as \$4.00 a thousand, that [198] is, remnants in some of these yards; one man named Perry Steffin, who was down below here, offered me the lumber in his yard at \$4.00 a thousand; that must have been about '93 or '94, I should judge. I was going to say this: a great deal in the price of lumber depended upon the location of the mill; for instance, you take a mill up in that canyon where the freight rate into Butte was low; they got a better price from that mill. They would get a 9¢ rate as against a 12¢ or 14¢ rate here; lumber weighs about 4 lbs. to the foot; up in the canyon the rate was as low as 8¢; there was a dollar, they had the better in the freight rate; lumber up there brought a better price than it did in this locality. I was going to say that fir timber, as a rule, commands a little better price for mining purposes than pine or tamarack; it is better timber for the mines. What we cut was mostly pine and tamarack, some fir at the Bonner Mill. In the Bitter Root it was mostly pine, and then a little tamarack, and way up the canyon, up that way, and on the hillside, they would get in quite a lot of fir. I have spoken about stumpage as bearing upon the market value obtainable for lumber. I know it to be a fact that during all this period, the Hellgate Canyon, from Bonita east, was being sawed indiscriminately—the land was not surveyed, and so mills were put in there; the timber all through that section was available. It was right on the line of the road, you know. The operations of



(Deposition of Thomas G. Hathaway.)

Mr. Daly during the period I have spoken of, had some effect on the price obtained for lumber. One time we sold Mr. Daly quite a lot of this timber, and then he put in mills of his own and he used to buck us in the market and the prices went down; he put in a mill at Hamilton and one at St. Regis. I know the Montana Improvement Company was incorporated about 1882. I know that [199] from the time of the incorporation of the Montana Improvement Company, Eddy-Hammond & Company, the copartnership, ceased entirely to have any lumber operations. From that time on it was in the mercantile business, and that business was ultimately sold to the Missoula Mercantile Company, or the business was incorporated as the Missoula Mercantile Company. It was a partnership before, and then it became a stock company, and they took in a lot of the employees. The Montana Improvement Company took over all the lumber business of the Eddy-Hammond Company upon the incorporation of the Montana Improvement Company. I was mistaken when I said on my direct examination that Eddy-Hammond & Company sold the Bonita Mill to Fred A. Hammond; I should have said the Montana Improvement Company sold it to Fred A. Hammond. The Montana Improvement Company owned the lumber, and I was on the road. I didn't keep the books and my business was selling lumber and establishing yards. I was away most of my time. My understanding is that the Montana Improvement Company owned the mill at Bonita and sold it to Fred Hammond. At the time of the



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incorporation of the Montana Improvement Company and until it ceased to do business, shortly after the Government brought an injunction suit, Mr. Bonner was president of the company and he was the moneyed man of the outfit. Shortly before the formation of the Missoula Mercantile Company, in 1886, at that time, Eddy was around Bonita; he was up there looking after, I guess, the building of that mill, as I remember it. We shipped up the machinery and boilers from Thompson, and he was there seeing them installed, and the mill put up. That mill was established in 1885, and I think that is about the same year the Missoula Mercantile Company was incorporated. I think it was in the latter part of 1885. I [200] know it was not in the winter. I think that it was in 1885 that we first got an intimation of trouble with the Government, that is in the year '85. I know that they commenced actions against people down there in that section of the country. The Government commenced suit against us for one million and a quarter, for damages for cutting off the unsurveyed lands, and then on account of that, we had all this trouble. We had quite a lot of timber on hand, you know, yet we disposed of it all right.

Q. Now, then, Mr. Hathaway, I would direct your attention to the fact that the records of the United States District Court for the District of Montana, show that the suit was brought against you in the spring of 1886; you have testified that some months before then you anticipated trouble of that

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kind?      A. Yes, sir.

Q. Now, I will ask you, first of all, is that the litigation concerning which you have testified, that litigation I have mentioned?

A. That the Government brought suit against us?

Q. Yes.      A. Yes, sir.

Q. Some months before that suit was brought, isn't it a fact that the Montana Improvement Company ceased to be an active concern and was in a condition of liquidation?

A. Yes, when we found out that that was going to take place, we sold off our yards and cleaned up our stuff down there and disposed of the properties to Cannon and Brittle, of Spokane.

Q. Now, having refreshed your memory as to those [201] dates, we would like to ask you if you think your testimony was correct when on direct examination you stated that the cut of this mill at Bonita was sold to the Montana Improvement Company or to Eddy-Hammond & Company?

A. Well, it is like this: when we found we had suit against us, we got out of the business as fast as we could; there was a new company organized, the Big Blackfoot Milling Company; there was explicit orders to buy nothing from anyone that got any timber off of unsurveyed land; that new company never did it. I had forgotten that, because, I tell you, in 1887, you know, we kind of stopped then; we didn't do much; the Government was after us and in 1887 when they started that Bitter Root railroad, why I was six months away from the company altogether

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working on the railroad myself.

(Witness Continuing:) A. B. Hammond was the head man contracting in connection with that railroad and most of his time was consumed in building the railroad. There was two branches; one was the Bitter Root and the other was the Phillipsburg branch; I was the bookkeeper, keeping check on both work and when the road was practically completed, they got me to take a contract to build ten miles up the Bitter Root. As to who was running the lumber business of the concern that I have testified about as existing at that time, when Mr. Hammond was away—whenever I could get any time I used to go out on the road, but I couldn't very well, and the business was kind of dull, and the yards that were through the country here sent in orders to the mills, and then a man by the name of Winstanley, that was our bookkeeper, he attended to most of it; he kept the books, and made out the bills for the Big Blackfoot Manufacturing Company, and most of [202] Mr. Hammond's time was taken looking after these railroads and subletting the contracts; he had a contract to build these roads, he and Mr. Bonner had, and they took most of their time at that. I did not mean to say that the Big Blackfoot Milling Company was incorporated immediately after the Montana Improvement Company was enjoined. The Montana Improvement Company was enjoined in 1886, and the Big Blackfoot Milling Company was incorporated after 1891, but the Blackfoot Milling and Manufacturing Com-



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pany was incorporated in 1888. As to the Bonita Mill, I took the inventory myself in connection with the deal between Mr. Fenwick and Fred Hammond. I know, as a matter of fact, that the deal was just what it purported to be, that is, a straight out and out absolute transfer from Fred Hammond to George W. Fenwick, and I took that inventory, and to the best of my knowledge, the deed from the Montana Improvement Company (I have corrected my testimony and said it was the Montana Improvement Company and not Eddy-Hammond & Company) to Fred Hammond, by which he acquired the so-called Bonita Mill, was to the best of my knowledge, an absolute transfer, just as it purported to be, because Fred Hammond was there and owned the property. I don't recollect the time that Mr. Fenwick took over that property from Fred Hammond. I don't remember the date. I remember the fact that I was up there and took the inventory, and figured up and found out how much stuff was there, and Fenwick took it and paid for it. I don't know how long Fred Hammond operated that mill. It is a long time ago. I cannot recollect exactly how long he did operate. I know that Fred Hammond bought it from the Montana Improvement Company very soon after they brought it down there. Eddy was up there some little time, and then Fred Hammond made the deal and bought the mill; it was his mill and he sold it. [203] The Montana Improvement Company didn't run that mill for more than a month or two—only a very short time—they started



(Deposition of Thomas G. Hathaway.)

building the mill, they had to build bunkhouses and stuff like that in there, some little lumber went for that, and then Fred went in and took charge and bought it. The Montana Improvement Company's office was right off the office of the Eddy-Hammond Company and the Missoula Mercantile Company, my memory is at that time it was down where the clothing store is; in the rear of the building and was right above where McLeod's private office is now. I think there was an outside stairway, separate stairway. It came down on the side stairs; they have rearranged that building though since then. I made a mistake when I testified that the mill at Bonita sold its product to the Blackfoot Milling and Manufacturing Company. The fact was that they sold direct; that was after the Government got after us for cutting on unsurveyed lands; the Montana Improvement Company, they unloaded their holdings; we didn't do any more business, we kept out of buying from mills that cut on unsurveyed lands; that was our instructions; but I was going to say further here, the Montana Improvement Company, while it ceased to do any more new business, they had on hand, my recollection is, in some of these old yards, lumber that was stocked and piled, had not been sold, after these Government suits were instituted, and that belonged to the Montana Improvement Company, as you said about the annual statements in 1897 or 1898, I think the Company had lumber for many years afterwards, it was hard to sell, you know, the remnants of a yard; there is lots of unsalable lumber left in it. My under-

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standing of the law is, that under the laws of Montana, the directors of a company, or trustees of the [204] company, have to file a statement annually, in order to avoid certain liability. I know that they have to file an annual statement; all incorporated companies have to do that. I don't positively remember when the Montana Improvement Company sold the last of its sawed lumber; I know there was some lumber at a place called Eddy for quite a number of years.

Q. It was enjoined, we will say, in the beginning of 1886?

A. I don't know. I know there was a suit brought against the Montana Improvement Company for damages for the amount of \$1,250,000.

(Witness Continuing:) I don't know whether it was an injunction suit or not; the suit was brought and they said they were going to put us in the pen, and you bet that stopped our work. With reference to the stockholders of the Big Blackfoot Milling Company, when it was incorporated there were some people took stock in that that had not been in any previous company; I don't know how many; but when it was incorporated, I know I got more stock. I did not know really who did have all of the stock; I know that the principal stockholders were the four I mentioned this morning, that is, Bonner and the two Mr. Hammonds and Mr. Eddy. I knew for a fact that W. H. Hammond had no interest whatever in the Montana Improvement Company at any time.

(Deposition of Thomas G. Hathaway.)

Redirect Examination.

Q. Mr. Hathaway, who handled the output of the Bonita Mill from the time that the Montana Improvement Company ceased its active operations until the Bonita Mill was closed down? [205]

A. This morning I made a mistake when I made that statement; I didn't keep the books, but now it has come to my memory, and it is a fact, it will show of record, you will see yourself, Mr. Fenwick billed direct his lumber; we couldn't touch anything that was on unsurveyed lands; he billed the lumber to the party that gave him the order.

Q. Did he bill any directly to the different yards that were then in existence of the Montana Improvement Company?

A. Sold to those yards on the outside?

Q. Yes.

A. Those yards on the outside were afterwards separately incorporated stock companies by themselves.

Q. I am asking about this particular time immediately following the time that the Montana Improvement Company ceased its operations; did Fenwick bill direct those yards?

A. If he sent any lumber there he billed direct.

(Witness Continuing:) I presume there was lumber sent to those yards, and I am pretty sure there was lumber sent, but those yards were in independent charge at that time, and the Helena Lumber Company, I had stock in it myself; it was incorporated; they bought out Hartwell and Edgar. As to when



(Deposition of Thomas G. Hathaway.)

they bought out Hartwell and Edgar yard, that yard was established after the railroad got through, late in '83 or perhaps early in '84. They run a short time and didn't make a success. Mr. Edgar was a relative of Mr. Bonner, and they then sold out and the company was started there under the name of the Helena Lumber Company.

Q. Who owned the stock in the Helena Lumber Company? [206]

A. There was some of the employees in there; I held some stock myself and a man named Hopkins, and I think Mr. Coombs had some, and other parties.

Q. Did A. B. Hammond have any?

A. I think that A. B. Hammond might have had some,—yes, he had; I am not sure.

Q. How many of these outside yards to which the Bonita Mill was billing lumber directly did A. B. Hammond have an interest in, and name the yards.

A. I cannot say that they billed any lumber; he had no facilities for manufacturing lumber.

Q. Didn't you testify a while ago that after the Montana Improvement Company ceased to take the product from the Fenwick Mill that Fenwick billed lumber directly to these various yards established by the Montana Improvement Company?

A. I said he sold these yards; I cannot say positively, but I think he did sell.

Q. How many of these yards to which you think Fenwick billed this lumber were owned by the Montana Improvement Company?

A. They were independent incorporations, except



(Deposition of Thomas G. Hathaway.)

the one at Great Falls.

(Witness Continuing:) I think A. B. Hammond had an interest in the Helena yard, Bonner owned the Deer Lodge Yard, M. J. Connell owned the Miner's Company in Butte; there were yards that were friendly to us; sometimes they would buy outside, they could buy where they saw fit. Hammond did not have any interest in the Miner's Lumber Company in Butte at that time. He acquired his interest in that, I think, it was in 1897. I said on my cross-examination that I took the inventory in connection with the deal made between Fred A. Hammond and George W. Fenwick when the Bonita Mill was sold by Hammond to [207] Fenwick. I did this at the solicitation of Fred Hammond. Fred Hammond—they wanted me—I went up there—I was sent there to take the inventory and ascertain the value. I cannot say who sent me, but I know I was there and I took the inventory. I don't know positively whether A. B. Hammond sent me there or not. I think Fred Hammond wanted me to come there. I cannot say what, if anything, A. B. Hammond had to do with the sale from Fred Hammond to Fenwick of the Bonita Mill. He might have had something to do with it, for all I know. I know that Fred Hammond and I had worked together, and he knew me, and when they talked of the trade, Fred Hammond, it was my business, as a rule, to go around these different yards and inventory, and knowing that business, why he suggested I should come there and I come there and took the inventory. I don't know

(Deposition of Thomas G. Hathaway.)

that A. B. Hammond had any interest in the Fenwick Mill after it was purchased by Fenwick. I couldn't say that he didn't have any; I couldn't say more than what appeared on the surface. I would say no, he hadn't any. The place was there and the price agreed on and the sale was consummated. I never stopped to see how it was wound up; I made the inventory and that was the value of the property. I don't know whether A. B. Hammond derived any profit from the timber that was sawed by Fenwick after the transfer from Fred Hammond to Fenwick. I only know this, that Fenwick was comparatively a poor man when he went in there and bought that mill out, and he didn't make so very much money, and in fact no mill man could make money in those days. I don't think there was much profit to divide, if any. I believe it wouldn't amount to anything. There was no money in the milling business. I don't positively know whether or not A. B. Hammond had any interest in the [208] Bonita Mill, but I am almost sure that he didn't, from the fact that Fenwick bought it; that would be between Fenwick, and as to A. B. Hammond, I know nothing about it. Fenwick was a poor man, comparatively speaking; he had something, but the lumber business there, there would not be much to divide anyway at that time. I did not see the purchase price passed from Fenwick to Hammond for that mill. It was like this: I didn't know how they fixed it. I know I made the inventory, and there was the value of the property. I left it there. As to whether it was conveyed by a deed or any instrument

(Deposition of Thomas G. Hathaway.)

in writing, I don't know anything more about the deed than I took the inventory. There was the value of the property, the horses and the stock and the mill, the timber on hand, and everything was down there on the ground. I don't know of the entry, if any, that was made in the books of the Missoula Mercantile Company leading to the transfer of the Hammond Mill from Fred Hammond to George W. Fenwick. You will have to ask the Mercantile Company.

Q. Do you know of any that was made in the books of the Montana Improvement Company?

A. There must have been an entry there because we sold the property.

Q. I mean from Hammond; when the transfer was made from Fred Hammond to George W. Fenwick, was there any record made of it in the books of the Montana Improvement Company?

A. No, sir; why should there be? It was between them two.

Q. I am asking you if there was?

A. I couldn't say; I didn't keep the books.

Q. Do you know where Fenwick received or procured [209] the purchase price that he paid to Hammond for the mill?

A. If you were in this country at that time, you would find there was no money in this country, everything was done on jawbone.

Q. I want to know what sort of an entry was made, or what sort of consideration was given?

A. Well, now, for value received, I suppose so, I



(Deposition of Thomas G. Hathaway.)

don't know. I made the inventory of it. I went up and took an inventory of the stock on hand, all the plant; there was so much value in black and white, and they agreed among themselves.

(Witness Continuing:) I cannot recall from memory what purchase price was paid. I don't know; nor can I recall how the price agreed upon was paid; I know Hammond went out and Fenwick came in and Fenwick was it.

Q. Do you want to be understood now to say that there was no timber received by the Montana Improvement Company from the Fenwick Mill after these suits were brought against the Montana Improvement Company?

A. That I couldn't say. I know that we stopped, and my orders were this: to go and sell out and clean up and I went out and sold and cleaned up. I was away. I sold the yard in Spokane.

(Witness Continuing:) I don't know whether there was any lumber delivered by Fenwick to the Montana Improvement Company after its suit; there was no lumber delivered by Fenwick to the Blackfoot Milling and Manufacturing Company. This morning I made the statement that business was done there, [210] but recollect this: I know there was positive orders given, on account of these suits, that no lumber should be bought from mills that cut on unsurveyed land. And we complied with the law.



Tuesday, January 21, 1913.

**[Deposition of Thomas G. Hathaway, for Plaintiff  
(Recalled).]**

The deposition of THOMAS G. HATHAWAY, a witness recalled and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

**Direct Examination.**

I am the same Thomas G. Hathaway who was sworn and testified in this case on the part of the plaintiff before A. A. Pelletier, a notary public at Missoula, Montana, on August 6, 1912. Since I testified before, I have stated to you that I desired to correct my testimony in one particular. This was in reference to who instructed me to take the inventory made by me at the time of the sale of the Bonita Mill from Fred Hammond to George W. Fenwick. When I was asked the last time when I testified, I said I got my instructions from F. A. Hammond. I find after thinking it all over that I was wrong. The facts are these: Fred A. Hammond spoke to me. I had met him sometime—asked him how things were going along. He seemed to be worried, when he said he wished he was back to Spokane and told me about the troubles he had at the mill. I had heard of their troubles outside, of the troubles he told me about, and afterwards when I met Mr. A. B. Hammond, I told him about Fred and about the trouble, A. B. Hammond said that Fred was to blame himself for most of his trouble; he intimated that he should be satisfied and that he himself was the cause of his

(Deposition of Thomas G. Hathaway.)

troubles. Well, then, nothing was done at that time, and then I thought it had been from him that I got the instructions from. I could not satisfy [211] myself afterwards that I got it from F. A. Hammond, and then it came to me, something that came up, that I know that I could not have gotten it from Hammond, because about that time George W. Fenwick and F. A. Hammond were not very good friends, that is, F. A. Hammond thought he had a grievance against him; I knew he could not have spoken to Fenwick about the sale; then I recollected, I knew then my instructions must have come from A. B. Hammond, because I was at that time working under him and he was my boss, and I know that he had instructed me, but I cannot remember. It is just like this, he can himself tell if that is so or not. I am positive in my own mind that they were not from Fred Hammond, and I wanted my testimony changed because it troubled me. I went and seen this gentleman (Mr. Hall), and I told him I thought that was a mistake. And I want my testimony corrected. Here is the fact: Fred Hammond when he met me seemed to be worried. I had heard of some trouble occurring up there at that mill other than what he told me; he did not speak about this trouble, but it was well known, I found out by A. B. Hammond afterwards when I went to see A. B. Hammond. He said Fred was really to blame. The trouble was this, I do not care to say about it, but here is the facts. It was a case of ill-feeling between Fred Hammond and Mr. Fenwick. It was a per-

(Deposition of Thomas G. Hathaway.)

sonal trouble and does not relate to this case at all, but it was the cause of his selling out and it was the cause of some of his feeling at Fenwick. I know from that that he did not make the deal with Fenwick. I am positive when I spoke to Mr. A. B. Hammond, he said Fred was to blame, and at that time nothing was done. Afterwards I got my instructions and I went up to the mill, and I met up there Mr. Fenwick, and we [212] went over the stock carefully and Mr. Fenwick and Mr. Hammond then agreed on prices, and Mr. Fred Hammond I remember was glad to get out at the time, although he did not get a very big price. I am therefore positive that instructions to take the inventory of the Bonita Mill preparatory to negotiating the trade between Fred A. Hammond and George W. Fenwick came from A. B. Hammond. I don't know exactly the financial condition of George W. Fenwick at that time; I did not think he was very well off. As to how long Mr. Fenwick had been in the employ of the Hammond people prior to the time he bought the mill from Fred A. Hammond, my recollection is he came out after the railroad came in, that would be in '83; it was in '83 and he was located on what is now called Clinton and was then called Wallace, and had charge of a lot of lumber yards, that is, he was shipping a lot of lumber that was owned there by the Montana Improvement Company. That was his first business. I would say he was acting as shipping clerk. Before this occupation, prior to the time he came to Montana he was a teacher in the



(Deposition of Thomas G. Hathaway.)

high school in Fredericton, New Brunswick. As to whether he had any property to any extent in New Brunswick or in the state of Montana, prior to the purchase of the mill at Bonita, I don't know, I never asked him. As to the instructions or directions I received under which I went back to Minnesota and employed men to come to Montana—I was working for the Montana Improvement Company, and received wages from that Company, I know up until '87, and I think I went back in '86 and my boss was A. B. Hammond. I went back twice and I am not exactly sure whether it was in '86 or '7 I went back the first time; I went back once, and if I remember right, went back again and got a whole lot of men. I know A. B. Hammond sent me back the first time, and I [213] guess the second time, for all that, but I think it was in '86 and '87—I know I went twice. I know the first time A. B. Hammond gave me the instructions to go back for these men. The second time I do not recall. The first time I remember distinctly; he told me—well, men were scarce in the country and the mills were short and they were pretty independent and pretty hard to keep and I went back there. I remember distinctly of getting a letter—there was some parties back there—to help me out and I went back there and hired the men at a place called Stillwater, Minneapolis and St. Paul and up in Duluth. The first lot of men that came out went to work for a man by the name of Haycock. He had a mill up here near the Marshall Grade, and when the men came, there had been a strike there and



(Deposition of Thomas G. Hathaway.)

the men went to this Haycock Mill, the first batch of men. I guess afterwards some of the men went to Bonner or the Bonita Mill—the first batch went to Haycock Mill. I think my services as salesman and general manager for the Montana Improvement Company ceased in 1887. I could not say whether I sold any lumber for the Montana Improvement Company after 1887. The reason I say '87 is because in '87 the Bitter Root branch was built, and I was employed on that end. I was keeping books also for the Drummond road, and afterwards, when they extended the Bitter Root branch, I had a contract and I think that was in 1887. I never sold any lumber for the Missoula Mercantile Company. The Missoula Mercantile Company, to my knowledge, never owned—they used to sometimes considerably back mills for the sake of trade. As to the financing of George W. Fenwick by the Missoula Mercantile Company, in his operations of the Bonita Mill, it is my belief that Fenwick paid his men and got his supplies from the Missoula Mercantile Company; [214] had an account with them. I don't know, of my own knowledge whether or not A. B. Hammond and Henry Hammond supervised or controlled the operations of the Bonita Mill while it was owned by George W. Fenwick. I believe that A. B. Hammond wanted to help his relatives and that certainly when Fenwick was there whatever Fenwick would make, it would be a pleasure to him. That is my honest, candid conviction—further I don't know. I don't hardly think A. B. Hammond was advising,

(Deposition of Thomas G. Hathaway.)

superintending and directing the operations of the Bonita Mill when it was owned by Fenwick. I don't know about it. I don't think so. I think that he wanted Fenwick to do well and I think he wanted Fenwick to buy it, as far as that is concerned, I think he wanted Fenwick to make something—it was always his way of doing business, to put his relatives in and give them positions where he could assist them in any way he could. I naturally suppose he did that to Fenwick in this case. I think really he helped Fenwick to acquire that mill. Fenwick can tell you about that better than I can.

#### Cross-examination.

As far as I know, Mr. Fenwick ran his own mill. I never was there very often. I know he had lots of grief. The Haycock Mill I have spoken of, was not situated on the Blackfoot River, it was three miles east of Missoula, where the brick yard is now. A man by the name of Haycock had it; it was on the Hellgate River, below the mouth of the Blackfoot River; no logs came down the Blackfoot for that mill. That mill was not connected with the Montana Improvement Company, or any of the other corporations. About my going East and getting men to come out here and work, I [215] know it was a proposition necessary for the good development of this country. Men were scarce and lumber was low and it was hard to keep them and I was sent East. I got my first lot of men in Minneapolis. I brought out, I guess, almost pretty nearly three hundred men both trips. Lots of these men found employment in

(Deposition of Thomas G. Hathaway.)

other places besides Bonita and Bonner Mills and logging camps connected with them. Some found employment in the store, but the main body of men I sent were lumbermen, lumber-jacks, good timber men. I am almost positive that A. B. Hammond sent me to make the inventory and transfer from Fred A. Hammond to George W. Fenwick of the Bonita Mill property. That is one thing A. B. Hammond can tell you himself, if he says it ain't so, you can take his word for it. I am positive they emanated from that office, from him. I told Mr. Hall that I wanted to be put on the stand to correct that part of my evidence, because I now think it was incorrect.

Q. Would you not like also to correct your evidence in this particular: Don't you know it to be a fact that when Fred A. Hammond took over the Bonita Mill from the Montana Improvement Company, he sold whatever lumber he manufactured there himself and not through any other company, firm or organization?

A. But that is a long time ago. I cannot remember. I find I made a misstatement the other day. I am positive in my own mind that Fred Hammond could not have sold any of the lumber manufactured by him to the Montana Improvement Company. I remember now, it comes back to me, that our orders were to close out all this business. That is one reason why the mills—I think were sold to Fred and the [216] Company got clear of it. I was sent myself, also, to these yards down in that country, down in Washington, to clean up all the property I could



(Deposition of Thomas G. Hathaway.)

there, and I am positive that Mr. Fred Hammond sold none of his lumber to the Montana Improvement Company. It sold nothing but our own lumber.

Q. In reference to Mr. George W. Fenwick, are you not also positive that while he was operating the Bonita Mill that he sold his own lumber?

A. I know, yes—I did not know the other day, but it is twenty-six years ago, and I cannot remember; this I recalled afterwards. I did not recall it until I was told by Henry Hammond, then I recalled it. It came back to me again, and I remembered, but I cannot retain that length of time. I haven't a good memory anyway. [217]

**[Deposition of Thomas Welch, for Plaintiff.]**

The deposition of THOMAS WELCH, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

**Direct Examination.**

I reside at Hamilton, Montana: I think I am 57 years old. By occupation I am now a gardener. I was once engaged in cutting or hauling timber in the vicinity of the Bonita Mill. I was first employed there I think it was about the latter part of April, or first of May, 1886. The way I came to be employed in that work was this: I think there were four or five of us came in here from the east and we were sent up there by Mr. A. B. Hammond. Mr. Hammond said for us to go up there. He did not know whether we would be needed or not, but to go



(Deposition of Thomas Welch.)

up there and see Fred Hammond. So we went up and Fred Hammond employed me. He employed me to work on the slip putting up logs into the mill. I continued at that work until they shut down for that log war; I guess it was some time in October of that same year, 1886, that the log war occurred. By the log war I mean that two parties got striving there to see who would get the logs. I understood the Hammond Company was one of those parties and Joe Irvin the other. I never at any time after I went to work at Bonita had any conversation with A. B. Hammond in regard to work. I received my instructions and directions from Fred Hammond while he was there. After I quit working in the mill we went to work up in the timber, up in the log war. All I know as to the description of the land over which they were warring at that time is that it was *called Gulch*. I think I was engaged in cutting and hauling logs out in the Cramer Gulch until February some time. At the time I was working there in the Cramer Gulch Joe Irvin placed a mill in there, that was my understanding it was Joe Irvin. With reference [218] to the Cramer Gulch, the Irvin mill was located on the right hand or main branch we called it of the Cramer Creek, maybe 60 or 30 or 40 rods probably above the forks of the creek. One branch went to the left and the main branch as we called it went to the right. Where the Cramer ranch house was I was familiar with its location. We used to call it the old Newman place or Cramer. I should say that the Irvin mill was

(Deposition of Thomas Welch.)

situated over a mile above the Newman or Cramer ranch house. I couldn't give you any estimate at this time of about the number of feet of log measure that I took out of the Cramer Gulch.

Q. Did the Irvin people,—or which direction from the Irvin mill were the logs taken that were sawed at the Irvin sawmill?

A. Well, they were to the right of the mill going up the creek; the creek runs like this and the mill sets here. It was up to the right the principal part of it, and on the bottom below the mill, below the forks of the creek some were taken out.

Q. Who took from the forks of the creek down? Who took the principal part of the timber that was cut off Cramer Gulch?

A. I believe it was the Hammond Company.

Q. Who do you mean by the Hammond Company?

A. Well, it was one time—I believe it was the Montana Improvement Company and then it changed to Eddy-Hammond three or four different titles.

(Witness Continuing:) Some of the logs that were cut south of the Irvin mill went to the Irvin mill and some of them came down to the Bonita mill. [219] I presume Fenwick was my immediate foreman when I did the cutting there in Cramer Gulch. The Irvin mill was also known as the Thompson mill. After we finished cutting in the Cramer Gulch I was sent to Bearmouth with a team in February of that year—sent to work at Little Mill up in there back of Bearmouth. At one time I cut timber out of the first gulch that lies east of Cramer Gulch. It must

(Deposition of Thomas Welch.)

have been in the fall of '87 that I logged out of there and the logs went to the Bonita mill which was then in charge of George W. Fenwick. I cut timber off lands adjacent to where the Fenwick mill was located south and west of the river. I was familiar with the gulch called Welsh Gulch or Gillespie Gulch. I presume they were one and the same. It must have been in '88 that I cut out of the Welsh Gulch and these logs went to the Bonita mill as far as I know. I had a verbal contract with these people to cut timber; that agreement was with George Fenwick and under that agreement I cut south and west from the mill and likewise in that first canyon east of Cramer.

Q. Were you familiar during the years '87 and '88 when you were working there with the prices that were paid for delivering those logs at the mill?

A. Well, there was a stated price for the delivery at the mill.

(Witness Continuing:) The price was \$5.00 per thousand. I was not familiar with the market value of the lumber after it was sawed. Under my agreement with Fenwick we got \$5.00 per thousand at the mill, and there was two or three different prices for skid logs at the mill. There were two or three I think there were three or four prices according to the distance. I think one was as low as \$2.75. [220] I couldn't be certain but I think it ranged from \$2.75 to \$4.00.

Cross-examination.

Q. The country as to which you testified has been



(Deposition of Thomas Welch.)

largely denuded cut over and timber has been taken away has it not?

A. Every place that we went there somebody had been there ahead of us cutting timber, roads, and stumps, logs—somebody there ahead of us. I would find it a difficult matter at this time to designate any particular acreage or area over which the people I worked for had cut. I wouldn't be safe in that. I couldn't designate any block of ground anywhere that was cut over by the people I was working for; I am just giving you the principal points where we worked, gulches. Nor can I be certain as to the locality which was cut by one mill as compared with the locality which was cut by another mill at that time. I couldn't unless I was on the ground and I have not been over the ground recently—not since I was there in 1894. Not for any search or anything of that kind. I might have accidentally been over it but I cannot recall being over it. I think it was April, 1886, that I first went up there. I am sure Fred Hammond was there at that time. Mr. Fenwick was not there when I went there first. I think he arrived there about the middle of August. I am sure that Fred was there on the 4th of July and I think he had charge of the 4th of July celebration. We had a dance the 4th of July; I remember Fred was there; I think he was in charge of that mill. I remember Kenneth Ross being there while I was there—he was not working there though when I went there in April the man in charge of the woods was I think Bill Harley he had charge of one camp up



(Deposition of Thomas Welch.)

the river, and on Cramer Creek I understood that had been run by Ross, but it was broke up, [221] that camp was not running; that had been run by Ross the winter previous. I never had any conversation with A. B. Hammond except the original conversation which resulted in my looking for employment up at Bonita—that is to say not any more than to pass the time of day when I would come down here sometimes. At this date I couldn't state how far I did cutting up Welsh Gulch; it might have been over a mile, it might have been nearly two miles but I couldn't place it; I should say it was in the neighborhood of two miles somewhere there around about. It was in the fall of '87 somewhere around there that I made this contract with Mr. Fenwick. They had the logs left from the log war which was brought from the divide between the Cramer Gulch and this Little Gulch east of the Cramer Gulch, some old logs that was brought there and couldn't be brought over to Cramer and was brought and landed on the top of the divide between those two benches. There were not very many but there was quite a few and he and I talked about me going in there and getting those logs out of there. Under the terms of the agreement he was to give me \$2.00 a thousand for bringing those old logs down to the foot of the hill where they could get them with trucks. I did not have to load them on trucks. He took them. I put them at the bottom of the hill. That was the only contract or arrangement I had with Mr. Fenwick except that we were then to go on and clean the

(Deposition of Thomas Welch.)

ground. I have testified something about \$5.00 a thousand being paid for delivering logs to the mill. I got paid this from Mr. Fenwick.

Q. Was that another contract then?

A. That was according to the amount of work you put on the logs. If you delivered them to the mill you got \$5.00; if you put them down at the foot of the hill that was as low as [222] \$2.75 for new timber.

(Witness Continuing:) I am now giving you the the price that was included in that one contract which I had with Mr. Fenwick. There were special prices for the different amount of work that you did on the timber and I did take some down to the mill itself and was paid \$5.00.

Redirect Examination.

I was not familiar with what it would cost to saw the logs. As to the date when the Fenwick mill shut down I haven't got it. I would say at random it was sometime before the Pullman Strike and the Coxey Army. If the Pullman Strike was in 1894 then the mill was closed down before that. I know I was there watching the mill when the Coxey people went there; nothing doing there then; the mill was vacant and silent and this also was the case in the Pullman Strike.

**[Deposition of Gust Moser, for Plaintiff.]**

The deposition of GUST MOSER, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

**Direct Examination.**

I reside at Saltese. By occupation I am an attorney at law. I have lived about thirty-one years in the State of Montana. I was at one time employed by the Missoula Mercantile Company. I first went to work for them in 1887 as credit clerk and then about 1889 I was made secretary and also credit clerk of the corporation known as the Missoula Mercantile Company. When my first employment began the firm of Eddy-Hammond & Co. had passed out of existence. As secretary and credit man of the Missoula Mercantile Co. I had charge of the books of the company and looked after the collections and after their stock books. [223] A. B. Hammond was in immediate charge of the business. I received my instructions and directions from him and Mr. McLeod, the manager. I was acquainted with George W. Fenwick in 1887. At that time I think he was running a small mill at Bonita. I cannot say whether or not A. B. Hammond had any interest in the sawmill that Fenwick was running at Bonita. My company carried an account with Fenwick at that time. I suppose the account between the Missoula Mercantile Co. and Fenwick was opened and carried at the suggestion of Mr. Fenwick or Mr. McLeod. I couldn't say which one. I could not say whether the Missoula Mercantile Com-



(Deposition of Gust Moser.)

pany received from the mill at Bonita and from Mr. Fenwick any of the lumber that was being manufactured during the years '87, '88, '89 and '90. Mr. Hammond had an interest in the Missoula Mercantile Co. from '87 onward. I never was connected with the Montana Improvement Co. I was connected with a company known as the Blackfoot Milling & Manufacturing Co. My connection with that company commenced about 1889 I should judge. I was secretary, that is a nominal secretary, I would say; kept the stock books down here in Missoula and service of papers was made on me.

Q. Were you familiar with the transaction or transactions by which the Blackfoot Milling & Manufacturing Co. acquired any property or interest from the Montana Improvement Co., if it did acquire any property or interest?

A. No, sir. To my knowledge and belief the assets of the Montana Improvement Co. were turned over to the Big Blackfoot Milling & Manufacturing Co. but the books were all kept at Bonner, that is all transactions, and I knew nothing about it.

Q. Do you know what assets the Montana Improvement [224] Co. had that were turned over to the Big Blackfoot Milling & Manufacturing Co.?

A. I couldn't say now. That was a good many years ago. I think they had some lumber and they possibly might have had a mill or two but I couldn't say, I knew nothing about these transactions.

Q. Who was in charge of the business of the Big



(Deposition of Gust Moser.)

Blackfoot Milling & Manufacturing Co. after it came into existence?

A. W. H. Hammond was the General Superintendent and Manager: A. B. Hammond was the President.

Q. Did you ever at any time hear Mr. A. B. Hammond give any directions and orders in regard to conducting of the business of the Blackfoot Milling & Manufacturing Co.?

A. I have heard him talk to Henry Hammond about the price of lumber and the price that they should pay for the cutting of logs and things of that kind but I couldn't say what the prices were that were set but I know that they talked it over right in the Missoula Mercantile Co.'s office every time that Henry Hammond came down.

(Witness Continuing:) I never heard any conversation between W. H. or Henry Hammond and A. B. Hammond in regard to the source from which they were obtaining that timber. I was the nominal secretary of the Big Blackfoot Milling Co. I never received any salary for it. I remember that there was a transfer of the property and holdings of the Blackfoot Milling & Manufacturing Co. to the Big Blackfoot Milling Co. The transfers were made by Mr. Thomas Marshall, the attorney, and I couldn't say just what the transfer was. I cannot recall the consideration that was given the Blackfoot [225] Milling & Manufacturing Co. for the transfer of its holdings and property to the Big Blackfoot Milling Co. It seems to me that it was about \$600,000, but

(Deposition of Gust Moser.)

whether that is the exact amount of the capitalization or not I cannot state. As to whether I know how that consideration was paid, I expect it was simply a transfer of stocks from the new company for surrendering the stock of the old one, that is my recollection. I don't know who owned and operated the Bonner Mill in 1886 but in 1887 my recollection is that it was the Big Blackfoot Milling & Manufacturing Co. I did not ever know of the Blackfoot Milling & Manufacturing Co. handling any of the product that came from the Fenwick Mill at Bonner. I have no knowledge whatever of the lands from which any of the Hammond interests cut timber during the time they were operating. I can name a few of the stockholders in the Montana Improvement Co., namely E. L. Bonner, R. A. Eddy, A. B. Hammond and a man by the name of Robinson. I was never employed by the Montana Improvement Co.

Cross-examination.

There might have been other stockholders in the Montana Improvement Co. but the names given are the only owners I now recall. I remember that A. B. Hammond went to the coast and also went to Europe in '92 and went into that Astoria deal in Oregon. We didn't see much of him after 1892—we saw very little of him. As to how much we saw of him between '89 and '92 I couldn't say positively, but I do know that after 1892 we saw very little of him; he went to Europe and did not get back until along in October and then he got interested in that Astoria

(Deposition of Gust Moser.)

deal and then down on the coast; he was away most of the time, of course, he made frequent visits to Missoula. [226]

#### Redirect Examination.

He certainly kept in touch with the business at that time.

#### [Deposition of Robert L. Harper, for Plaintiff.]

The deposition of ROBERT L. HARPER, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

#### Direct Examination.

I reside at Hamilton. My occupation is lumbering—a sawmill. I cut and manufacture it. I have resided in the State of Montana since February, 1888. I first got acquainted with George W. Fenwick when I came to his plant in February, 1888, that is where I worked when I came to Montana. It was at the Bonita Mill. At a later date I had a verbal agreement for cutting and hauling logs with Mr. Fenwick. He told me he would give me so much for such logs if I would get them down off the hill where he could get to truck them. To the best of my recollection, it was in November, '88, I had this contract with Mr. Fenwick, and I probably commenced work under it the first of December. I think it was \$4.00 I was to receive for hauling the logs and putting them where he could get the trucker. My work included both the cutting and the skidding of them. I am not familiar with the section lines and the sections as surveyed out by the Government in the



(Deposition of Robert L. Harper.)

vicinity where I cut, but I am practically, not extra good, I think I know the local names applied to the gulches where I cut. The first cutting I did was in Little Gulch, between the Strong Gulch and the Cramer Gulch. At that time it was known as the Welsh Gulch. Welch had a camp on it. That gulch was on the north side of the Hellgate River—it would be east up the river from the [227] Welsh Gulch and on the north side of the river. The Cramer Gulch would be a little west of the gulch I was in. It was the first gulch east of the Cramer Gulch. I do not remember exactly how many logs I cut off and skidded out of that gulch, but I think it was somewhere between three and four hundred thousand. I am not positively sure, but it was somewhere in the neighborhood of that. My cutting extended a mile or a mile and a quarter from the river, or such matter as that; we fetched the logs between a half and three-quarters of a mile and then they trucked them, I expect, about half a mile. These logs were ultimately put into the river and went to the Bonita Mill. I am familiar with the place where Mr. W. K. Will's house is now situated. I cut a few logs in that vicinity, probably 100,000, or thereabouts, for Fenwick. I think it was in the neighborhood of 80,000 in that gulch that somebody had cut. I was told that Rich and McIntosh had cut them, and I put them down on the bank of the river. There was not in my time any particular local name given to that area where Will's house is situated. I don't know what section it was on. I received \$4.75 for putting these logs cut in the vicinity of Will's house



(Deposition of Robert L. Harper.)

on the bank of the river. I cut west of the Will's house, probably a quarter of a mile, maybe a little better, not much over a quarter, I don't think, for I just went up the hill; I didn't have no sleigh or truck. I just snaked them down. I didn't go very far. I was cutting a little east of the Will's house; it was probably a quarter of a mile east, not more than a quarter, along where Will's house is now, practically the hill back of the mountains. I was only in the one place; I just put them all on the one place; there was only just one gulch that they came out of. [228] There had been some timber cut there prior to the time that I was cutting; the fellows that cut this 80,000 or so that was left in the gulch had put some in, I don't know how much. They were cut the year before. I determined that they had been cut the year before by the way they looked, they were not very old logs, you could tell, the bark was still on them. There were no other places that I cut in the vicinity for Fenwick. I cut about 100,000 beside the old logs that was cut—probably 80,000, or thereabouts, in the vicinity of the Will's house, I don't recollect it just exactly. The amount that I cut and the amount that I skidded out of there was somewhere about 180,000. I was paid for my contracts there by Mr. Fenwick giving me a check, what we called at that time, a check on the Missoula Mercantile Company, and that was paid in cash, or in goods, by the Missoula Mercantile Company, accordingly if you had bought any goods beforehand, it was held out of you and the balance was paid in money.

No. 2503

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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Transcript of Record.  
(IN THREE VOLUMES.)

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A. B. HAMMOND,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

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VOLUME II.

(Pages 257 to 568, Inclusive.)

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Upon Writ of Error to the United States District Court  
of the Northern District of California,  
Second Division.

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F. D. MONTGOMERY

NOV 11 1914

Filed



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(Deposition of Robert L. Harper.)

Cross-examination.

The cutting I have testified to was the spring of '89. I am testifying now from my recollection of what occurred in '88 and 1889. The only person I ever got any instructions from was Mr. Fenwick. I don't know as I knew Mr. Hammond at that time.

Redirect Examination.

I think there was a little Frenchman scaled the timber that I cut and skidded, I don't recollect what his name was. The last person who scaled for Mr. Fenwick was his foreman by the name of Bill Graham. The work that was done by Rich and McIntosh was in the gulch west of the Rich Gulch, between Rich's Gulch and the Strong Gulch. This 80,000 feet of logs that I found on the ground in this gulch, which I say I [229] knew from hearsay were cut by Rich and McIntosh went down the river to the Bonita Mill.

**[Deposition of William Harley, for Plaintiff.]**

The deposition of WILLIAM HARLEY, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

Direct Examination.

I am sixty-four past. I reside at Missoula, and have been a lumber-jack in the years past. November 11, 1885, I first came to the State of Montana, landing in Missoula. I was at one time employed in and about Bonita and Nimrod, Montana, cutting tim-

(Deposition of William Harley.)

ber. As to how I came to get that employment, in the first place, I worked in 1885 for Fred Hammond by the month, and he sold out to George Fenwick; then I went to work for Fenwick. I did not have any talk with A. B. Hammond when I first went to work for Fred Hammond regarding my working. It was in '85 that I went to work for Fred Hammond. That was in Bonita; then Fred sold out and I went to work in '86 for Fenwick. I had not worked at the Bonita Mill before I worked for Fred in 1885. My duties there was logging; supposed to be logging for Fenwick, that was my supposition, that was the way I was hired and he paid me that same way. Getting back of that, A. B. Hammond recommended me as a logger to Fenwick. I met A. B. Hammond on the street and he told me that Fenwick wanted a logger; he said I have recommended you as a logger, that is as near as I can remember the words. That is twenty-six years ago, and after that conversation with A. B. Hammond I went to work with George Fenwick. The first place I did any cutting for Fred Hammond was right there at Bonita and right on Buck Tail Hill, or Beaver Tail Hill, as it is now called. [230] That was for Fred Hammond in 1885. I cut the first logs right on that knoll. I was hired by the month, paid so much per month by Fred Hammond in 1885 when I was working on Beaver Tail Hill in the winter and fall of 1885. I couldn't say exactly how long I worked for Fred Hammond on Beaver Tail Hill. It is too long ago; several months; I cut what timber was worth while cutting

(Deposition of William Harley.)

on it. It was about May or the first of June, in 1886, that my employment with George Fenwick commenced. It is pretty hard to tell where first I cut for Fenwick. I know it was a little piece above Bonita, above Beaver Tail Hill, on the same side of the river, that is the first logs I cut. Beaver Tail Hill runs up in Cramer Gulch, and it was on the east of Beaver Tail Hill, that is the first logs I cut for Fenwick. I worked in that vicinity for Fenwick all along up and down the river until November, 1886, then I had a racket in there and I got out. I had charge of the logging crew and furnished the mill with logs; that is what I was there for. After we cut the logs off the east side of Beaver Tail Hill, we went up on the river. I had a movable tent. We had tents. We were cutting along the stream and lowered them in as we came to it. We went to Harvey Creek, above Nimrod, which was Carlin at that time. I cut up Cramer Gulch. I should think it was in the neighborhood of a mile and a quarter or a mile and a half, I don't know exactly.

Q. Was the Thompson Mill in Cramer Gulch when you were there?

A. Thompson come in in the night with about forty men; Fred Hammond and I had been there the winter before, and we had left this camp and utensils there. There was a [231] lot of logs cut, but this fellow Thompson come in in the night and started trouble everywhere else. We were up at Carlin. I had a crew of twenty men logging along the country there and Fenwick sent up for us to bring the crew



(Deposition of William Harley.)

down and run these fellows out, but they didn't run worth a fig; they stayed there.

(Witness Continuing:) I had a conversation with Fenwick as to who owned the land and logs. When he ordered me to take these men, to take my crew and run them fellows out of there, I asked him who owned this timber. He said Uncle Sam, I guess, I should suppose. I said them men don't run worth a fig off of Uncle Sam's timber. I told him I wouldn't have nothing to do with it, with them, I told him to give me my check and I quit. And I did quit at that time. Before we cut the timber in Cramer Gulch, I cut timber in Rich Gulch; we cut wherever we could find any logs around the river handy. I don't think I had any directions as to where I should cut; wherever I seen good timber, I went for it.

Q. Without regard to lines or ownership?

A. That was nothing to me at that time; at that time I was alive.

(Witness Continuing:) I was cutting in this manner under the directions of George W. Fenwick. I was hired by him and recommended by Mr. A. B. Hammond. I know where Medicine Tree Hill is. I cut logs all around it. That was the summer of 1886. These logs were put in the river, driven down to and sawed at the Bonita Mill, which Fenwick was then running. I have no recollection now of the amount of timber that I cut, I couldn't form an opinion. I am sure I didn't know how many we were putting in, [232] or anything else, or what we were cutting in a day at the mill; as long as I kept

(Deposition of William Harley.)

the mill furnished, that was all, because we didn't think we could furnish the mill when I started in, I didn't like the prospect, but we did manage to keep the mill running, that was in November, 1886. I know where Tyler Gulch is. I didn't have anything to do with cutting in Tyler Gulch. No one was cutting out of Tyler Gulch in my time. Nobody was hauling any logs out of there that I know of or remember of, I don't think there was. I have testified that we cut all along from Bonita up to Medicine Tree Hill. Some places we went further up the slope of the mountains in cutting than others. The farthest distance up the hill was up a quarter of a mile, I should estimate it, I don't think it was any more than that. We cut on both sides of the river—wherever there was any logs to cut handy to the stream, we cut them.

Q. Were you familiar during 1885 and 1886 with the market value of the lumber that was cut at the Bonita Mill after it was sawed into merchantable lumber?

A. No, sir, I couldn't form any opinion. All I would know would be hearsay; I heard it was about \$10.00 a thousand.

(Witness Continuing:) During all my employment in connection with the Bonita Mill I worked for wages. The way I was paid, I got a time check in Bonita to the Missoula Office—of the Missoula Mercantile Company, or the Montana Improvement Company, or something like that. It was the store that was run right here in Missoula. I don't know

(Deposition of William Harley.)

for certain who it was exactly who usually paid me. I think it was John M. Keith; I know he was [233] in the office anyway, that is a long time to remember.

Cross-examination.

All I know is what I remember about the Bonita country and Hellgate Canyon in 1886 and 1888; I have not been there since. When I was cutting down there around the Hellgate River, I saw lots of stumps that had been cut off at an earlier date. I remember the old Haycock Mill. I worked for Haycock in 1887, after I worked for Fenwick. I stopped working for Fenwick the fall of 1886. I worked for Haycock from May to December, 1887. I have testified that I was cutting anywhere I found any trees at all, without regard to lines or anything else. Everybody else was doing the same thing down there; there was no lines to go by. I don't think the country was surveyed at all. I never seen no lines. I suppose everybody else cut this way beside the Fenwick people. I never seen any caretaker of the timber at all; You know, the Thompson outfit came in there and cut the same as the rest. I was not able to run the Thompson people out. They stayed right there and put a mill in the gulch. At this late date I don't pretend to remember the particular area that was cut off at any time in these different places that I have spoken about—I cannot form an opinion; nor do I remember just how much was cut off of one side of a gulch, or how much off the other. It is a fact that everywhere that I cut I found evidences, stumps



(Deposition of William Harley.)

of trees, showing that people had been around about there cutting before.

**Redirect Examination.**

The Haycock Mill was located only three miles from Missoula, up here at the brick yard. It was not anywhere near Bonita. I don't remember anybody cutting in the Hellgate and running a sawmill in the Hellgate Valley other than the Thompson [234] outfit while I was working for Fenwick. The Thompson Mill was finally set in Cramer Gulch, about a mile and a quarter from the mouth of the gulch, as near as I could judge. The slope of the ground from the mouth of the gulch up to the Thompson Mill was up creek—there was a small creek in that gulch. I don't know where Thompson cut after I left; I was there a few days, we was cutting all around through each other. I don't know where those logs went that Thompson cut in there while I was cutting.

**[Deposition of John Welch, for Plaintiff.]**

The deposition of JOHN WELCH, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

**Direct Examination.**

I reside eight miles the other side of Hamilton; I used to be a timber-jack; some call it a timber beast. My present occupation, I follow logging, hire out. I am a brother of Thomas Welch, who was on the witness-stand yesterday. I am sixty years old. Once I worked at Bonita, Montana; commenced to



(Deposition of John Welch.)

work there the latter part of August or September, in 1886. G. W. Fenwick hired me to work there. I was employed by the month for the first year. As to duties—I followed the sidehill work, peeling logs, shooting down, when I first went there. There were no Government surveys out there while I was there. The first work I did for Fenwick was on Cramer Gulch. I commenced there the first part of September, 1886. I worked there until the first part of February. As to the distance from the mouth of Cramer Gulch up in the mountains my work extended, I think they used to call it a mile and three-quarters up to their camp, or a mile and a half. The Thompson Mill was not located in Cramer [235] Gulch until the time of the log war and the log war was in the fall of 1886. The log war was settled when I left Cramer Gulch in February.

Q. What part of the gulch did the Fenwick Mill get and what part did the Thompson Mill get?

A. Thompson got the right-hand side going up, or part of that. They used to fall trees and mark the stumps; they wouldn't cut the trees up at all, and then they would go around after awhile and cut it.

(Witness Continuing:) As to what became of the logs in the Cramer Gulch, a few below the mouth of the north branch, I call it, of Cramer Canyon, they went to Thompson's Mill. McConnell was the main man of Thompson's Mill. It was in the main Cramer Gulch that the division was made. I couldn't say how much the McConnell crowd got out of the gulch there. I was just working there by the

(Deposition of John Welch.)

month. I didn't take any notice of that, hardly at all. I couldn't say how much the Fenwick Mill got as compared with how much the Thompson-McConnell Mill got. I left the Cramer Gulch, I think it was the first part of February, 1887. I went from there to Bearmouth. Up there I was doing the same kind of work. Graham was the push up there. By the word "push," is meant the head man—the head man of the camp that tells you what to do. I stayed at Bearmouth from February until after the first part of April. Bearmouth is about two or three miles east from Tyler Creek. When I finished at Bearmouth, I came to Bonita to work. I worked on the slip, on the pond, hauling logs at the mill. That fall, in 1887, me and my brother took an agreement from Fenwick to cut some logs in the vicinity of the Bonita Mill. We cut on that first canyon across what they call Beaver Tail Hill. [236] At that time we didn't work in the Cramer Canyon. The first time we worked it was east of the Cramer Canyon where Harper afterwards worked. There was a little island near the mill; there was a few scattering trees on it and I think a few logs that had been left. We put them in. Around Beaver Tail Hill we cut a few logs, not many. I worked in the Welsh Canyon in 1889 and 1890 was the last logging I done for them, I think it was in the spring of 1890. While I was working there for Fenwick, Harris and Bob Haskerville they had a mill at the mouth of Rock Creek; that would be two miles west of Bonita. That mill had been there before I was there. Welsh Gulch

(Deposition of John Welch.)

was the last gulch we cut in. The year before that we cut down across from the mill and hauled some over and Fenwick hauled some over. That was on the right hand side of the river going up from Bonita south, I guess.

Cross-examination.

In 1897 I was back in the Hellgate Canyon. I was logging there and went busted. I was working for Harper and Baird across on the south side of the river in one of those old canyons. I don't remember the name of the canyon. It was close to the old mill—where Harper and Baird had their mill. The Fenwick Mill was on an island and their's was across the river. They built a bridge across the river to be on the right hand side of the river. I think it was in 1897 that Harper and Baird built their mill. While I was cutting for Fenwick over all this territory that I have testified to, I found evidences that somebody had been cutting there before; I found stumps everywhere I went. [237]

**[Deposition of John Cunningham, for Plaintiff.]**

The deposition of JOHN CUNNINGHAM, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

Direct Examination.

I reside at Kallispell. By occupation I am a lumberman and am fifty-three years old and have lived in the State of Montana twenty-six years. I was first employed in lumbering on the Blackfoot River by the Hammond people in 1886. Tom Hathaway



(Deposition of John Cunningham.)

first hired me when I was at Minneapolis. When Mr. Hathaway hired me he said I was to go to work for the Big Blackfoot Milling Company—that was the way I understood it. I came to Montana, right straight to Missoula. When we came to Missoula we saw A. B. Hammond, who told us to go up to the Blackfoot River and to report to George Hammond, which we did. At that time George Hammond was at the Headquarters Camp, at Fish Creek. My employment was by a monthly salary. We didn't have any contract. I was put in charge of a camp by George Hammond. It was the place known as the Nine Mile Prairie on the Blackfoot River. I think that was somewhere in September, 1886. The camp was called the Eckwall Camp, and I think I remained at that camp about five months. I was logging foreman of that camp and in charge of it. I was not at that time familiar with the section lines in that country. I had just come here. I am not sure if the country was surveyed at that time. Since then I have been along past the ground that I cut over adjacent to the Eckwall Camp; never been over the ground and never run out the lines or anything. No one ever intimated to me where the section lines were or where the different sections are in that vicinity. I was there with Mr. Swartz in March, but we didn't go over the lines at all. I think the Eckwall Camp was on section 21; we cut west from the Eckwall Camp. I cut all around the lines of section [238] 18, township 14 north, range 15 west, but I am not sure as to cutting any over the lines, I don't



(Deposition of John Cunningham.)

think I did. I couldn't swear to the year the timber was cut off section 18; it was in the spring of the year, and I think it was 1891 that I broke the landings there. The Eckwall Camp was situated north of the Big Blackfoot River, about three-quarters of a mile, I should judge. Since I worked at that camp I have learned where section 20 is. We did not cut any off of section 20 north of the river during the winter I was working at the Eckwall Camp, nor did we cut any off section 20 south of the river. I know the timber was cut off section 20, but I don't remember the year, nor can I recall what year it was I broke the landings on section 20. After I quit the Eckwall Camp I run the Headquarters Camp at Fish Creek; that was in 1887 and 1888. I was foreman of the camp. I know where the Edgar claim is, lying in the southeast corner of section 28, township 14 north, range 14 west. I think I cut timber off the Edgar claim in the winter of '87 and '88, when I was in charge of the Fish Creek Camp. I cut all around there. As to whether I cut any off section 34, on the northwest corner of section 34, I am not familiar with the lines; I was not at that time; I cut right southeast on the sidehill from the Edgar claim; that was the same winter. I could not give you any estimate of the amount of timber I cut off the Edgar claim. I think there was some cutting on the Edgar claim before I cut there. The timber was pine that I cut from the Edgar claim and it compared favorably as to quantity with the other cuttings that I did in that vicinity. I have not any idea of the amount

(Deposition of John Cunningham.)

of timber I cut off the quarter section that joined on to the southeast corner of the Edgar claim—the section which you have designated as 34—I don't know whether [239] it was 34 or not, but it corners right on the southeast of the Edgar claim; the way I have it in my mind is that it was the quarter section that joins on the southeast corner of the Edgar claim. That was cut in 1887 and 1888. The logs cut off the Edgar claim and the logs on the claim that you have designated as the northwest quarter of section 34, were driven to Bonner in the spring of 1888, I think. When I finished my work at the Headquarters Camp on Fish Creek, I contracted that year at the mouth of Belmont Creek. That winter when I cut at Belmont Creek, we cut sections 23 and 25. We built our camp on section 26. We built our camps of timber taken from 26 and built two bridges out of said timber. I didn't cut any on what was known as Longley Flats. I know there was a camp situated on the Longley Flats in 1887, that is, a tent camp, but I couldn't swear that they were cutting on that flat, but the camp was right on the bank of the river on that flat. I broke no landings on that flat—those logs were put in and floated away as fast as they were put in. This is what we call summer logging. Tom Harrington had charge of the camp at that time. Pat Hayes was not there at that time; he had a camp there the winter before. I don't know whether Pat Hayes cut any off the Longley Flats. I think he cut on 29. I have seen the Sontag ranch. I have been past it lots of times. I cut in

(Deposition of John Cunningham.)

the vicinity of that ranch in '87 and '88, but I do not remember from what portion of the section I cut off. I cut on both sides of the Sontag ranch-house, that is, east and west of the house. I didn't pay any attention to the lines; I didn't know who owned the sections; I didn't know anything about it. These logs cut in the vicinity of the Sontag ranch-house were driven to Bonner. I contracted from 1891 to 1897 [240] for the driving of the logs down the river. Those contracts were made with W. H. Hammond from whom I received my orders and directions while I was working under a salary. I went there first in 1886 and there was no difference in the way in which the logging operations were managed and directed from that time on up until I quit. During all that time those operations were under the management and direction of W. H. Hammond. For this work I got my checks at Bonner and during the first few years they were cashed at the Missoula Mercantile Company store, afterwards at the bank. I knew J. M. Boles who lived near Sunset. I knew of cutting going on back of Boles' house in '90 or '91, if I remember right. Dunnigan did that cutting. I do not know what section Bob Moore logged on back of Boles' house prior to the time that Dunnigan was there but he logged there. During the years I was working in the Blackfoot country I was paid from \$3.00 to \$4.00 per thousand for sawing and banking the logs on the river. The most I ever got for floating logs down the river to Bonner was 15¢ a thousand and from that down to 7, 7½¢ per thousand.



(Deposition of John Cunningham.)

When I was first employed by Mr. Hathaway, Jack Keith told me to report to A. B. Hammond. We went into the store and told him what we came for, and he told us to go and see A. B. Hammond, so Mr. Hammond gave us a team to send up the river.

Cross-examination.

When I said I was paid \$3.00 or \$4.00 a thousand that was for services in taking the logs from the stump and banking them on the river. W. H. Hammond always told me that under no circumstances was I to cut across lines that had been marked out, not to cut on Government lands. I got those instructions every year that I logged for them and I got called down quite a number of times besides. I got called down by Mr. Hammond for [241] cutting those logs off of section 26-14-16. That was where I made a camp. McNamara was contracting with me. I think I cut those logs on my own responsibility. Mr. Hammond did not contract to furnish the camp. When I was told to work in a certain locality I always found the lines had been run. Bob Moore logged at the Elk Creek Camp right at Sunset. I did not know where section 18-13-14 was. I was there in March of this year with Mr. Lantz and Mr. Schwartz, Government agents, but until then had not been back there since I left that country. We were not at the lines of these various sections. We were where we could see the ground in these various sections except section 26 or the Belmont section. We could not get on there on account of the snow, but I know I logged there. I did not log on section 26. I



(Deposition of John Cunningham.)

logged on 23 and 25. My camps were built on section 26. I do not know that it was in 1890 or 1891 that Dunnigan cut back of the Boles house. I am not very sure what year it was. I know there was cutting down there. I was there when Bob Moore was cutting it, but I wasn't familiar with the section he was cutting on. I know it was back of the Boles house but I am not sure when it was. I know where the Boles house was. I don't know as I could explain just where it was or not. I know where he lived, he just moved in there about that time, if I remember right, he was building a house there at that time. I do not pretend to know or testify as to the area of acreage that was cut over by Bob Moore at that time. I am positive I cut some of the Edgar claim, I could not tell you how much. I am positive I cut on the Edgar claim; the Edgar people was continuously at me not to fell trees on the house when I was cutting around the house there. There was some scattering trees right around the house and we did fall one right close to the house, and [242] the old lady she used to come after me about every day not to be falling trees on the house. There had been some cutting on the claim, I did not cut the entire claim. I did not go over the ground to see how much I left standing; I know I cut some on it, and then I was told to cut up on the sidehill, and finished up there, now, as to the section, I could not swear what section it was on. It was southeast from the Edgar claim. I do not remember that I cut on section 33, a railroad section. These gentlemen went

(Deposition of John Cunningham.)

out with me and pointed out the land and that is where I cut. I do not know whether I cut on section 15. I went where the walking boss told me, Mr. George Hammond. At that time I was a stranger in the country and did not know of the lines or much about them. I would not swear that I did not cut on section 33. I do not remember cutting north of the Sontag ranch-house. I am not sure that I cut on the Cunningham claim on the northwest quarter of section 34-14-14, I do not know what claim it is even. I said that I cut southeast of the Edgar claim up on the sidehill because we had roads down there, and we killed a horse on that hill. I testify positively that I cut on that quarter which corners on the Edgar claim in the same year that I claim I cut the Edgar claim; I was just there the one year. I could not tell the area I cut on the hillside southeast of the Edgar claim. The horse was not killed south of the Edgar claim, I think it was killed southeast. I did not know the lines of the Edgar claim. I never run out the lines of the Edgar claim. I cut in sight of the Edgar house, somewhere about a quarter of a mile from the house to the first of the timber on this sidehill, it might have been not quite that far, somewhere around there. I do not know on what part of the Sontag claim the Sontag house was located. I cut about half a mile east of the Sontag ranch-house, that was in '88 or '89, the second [243] year I was there. I cannot give the area I cut off. I also worked west of the Sontag ranch-house, probably half a mile on the sidehill. I took the scattering

(Deposition of John Cunningham.)

trees here and there where they had been left by other men that had been in there cutting. The company wanted to clean it up, so I went there to clean it up; just took a few scattering trees here and there that had been left. Milt Hammond done the scaling. I never kept track of the amount of timber I cut in that scattering timber tract. I do not remember having a bet with Milton Hammond as to the amount of timber on a certain stretch of land up there around by the Sontag house. I might have had such a bet, but I don't remember now. I believe I stated there was a camp on the Longley Flats in 1887. I did not state that they were cutting on this flat, if I remember that rightly. There was a logging camp there, that is, a tent camp, and they were logging along there that spring, when we were driving, the spring of '87. I do not know to what extent they took timber there at all. That was on the north side of the river. Pat Hayes built his camp there in the fall of 1887, along the line of sections 28 and 29. Pat Hayes was there the next spring after the tent camp was there, the spring of '88. The tent camp was there the spring of '87 and Pat Hayes built the camp later on, the fall of the same year. I have spoken about cutting this scattering timber up around the Sontag house. This scattering cutting was the only cutting that I ever made around the Sontag house. The quantity cut was small. Oh! it would not be two million feet. As to whether I ever estimated at any time that there was two million feet that I was going to cut up there, I would reply that I was picking up the scattering



(Deposition of John Cunningham.)

trees; I probably didn't cut over five or six hundred thousand altogether; that is just an approximate estimate [244] of it, along that sidehill, possibly not that much; I know there was nowhere near two million. It was ground that had been cut over before.

After I got to Missoula, we went to the store of the Missoula Mercantile Company and Jack Keith was there. He was the first man we went to, and he told us to go and see A. B. Hammond. We told him that Hathaway sent us out, and asked him which way we would go, so he told us to go up the Blackfoot River, and he said he wanted to send a team up, so we took the horses along. That was all A. B. Hammond said to us. When I got up there, George Hammond put me to work. He never set any wages. Hathaway set our wages at \$35.00 a month. A. B. Hammond never mentioned wages to me. He never mentioned employment at all except he told me how to go up the Blackfoot River.

#### Redirect Examination.

I was in the courtroom yesterday when Mr. Tom Hathaway was testifying. He is the same gentleman who employed me in Minneapolis to come out here to work. The cutting near the Sontag ranch was done late in the fall of the year I was in charge of the Fish Creek Ranch. There had been other cuttings in the vicinity before that time. I couldn't say who cut it. The Boles house was the site of the Sunset Postoffice. By the term "breaking the landings" I mean that the logs were piled up in piles on the



(Deposition of John Cunningham.)

bank and we lowered them out into the water so that they would float down the river. There was no one else engaged in [245] breaking the landings, and making the drive down the river during the time that I had the contract for this work for the Hammond people—I had entire charge of it.

Q. Were any of the logs that were cut off of the sections over the lines that had been marked out, ever rejected by the Hammond people, and did they ever refuse to accept any of those logs?

A. Well, if there were any logs cut over the line, whoever cut them didn't say anything about it; they went into the drive and were settled and paid for.

(Witness Continuing:) During the time I was working up there, the Hammond people never refused to accept any of the logs that were cut and driven down the river.

Recross-examination.

The refusal would be made at Bonner if it was going to be made; I know very well they wouldn't know the logs; they wouldn't know anything about it; that is what I stated.

Q. Did you ever cut over the lines?

A. I cut some on 26 for building purposes, not intentionally.

(Witness Continuing:) That was my own enterprise when I had a contract, and I never did cut a log over the lines intentionally; I don't know that there was any other of the loggers that cut over the lines; I know that I had instructions not to cut over the lines, and I think all the loggers had. As to the

(Deposition of John Cunningham.)

cutting of the timber southeast of the Edgar claim, I just took the timber that cut handy, and I don't think I cut the whole of it; I don't think I come up near the line at all; there was something [246] happened, snow or something, I am sure, I didn't cut the whole of it. I don't know how much I got off of that. In reference to the Edgar claim, I don't suppose I cut to the lines there. I don't remember seeing the lines. As to whether the section lines wherever I cut were plainly cut, I don't remember much about the lines; at that time I was a stranger here. They would show me a bunch of timber and tell me to go out and cut it. I didn't run out no lines. I don't remember anything about the lines. I never looked for any lines. I know what you mean by the blazes that had been marked to define the timber. At that time you must understand we didn't cut timber as they do now; we only took a little bunch here and there; we didn't cut it clean. I don't remember much about the lines at that time.

**[Deposition of Mike McNamara, for Plaintiff.]**

The deposition of MIKE McNAMARA, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

**Direct Examination.**

I reside in Missoula County, Montana, and work in the woods; lumbering. I first came to the State of Montana in 1886. I worked for the Hammond Company. I commenced to work for them in 1886—the

(Deposition of Mike McNamara.)

Blackfoot Milling Company they were called at that time. I was working for a salary. W. H. Hammond employed me. It was along in August or September, in 1886, that I first commenced to work for them. I worked for them at Bonner. The first work I did I built an apron there for the dam; I then went up the river and worked up there in the woods; I drove a team there. I worked off and on about fourteen or fifteen years for the Big Blackfoot Milling Company. Their mill was located at Bonner when I [247] first commenced to work for them; no other mill was located there that I know of. It was along in the fall, August or September, in 1886, that I first went in to the woods to work for them. I worked at Tom Harrington's camp awhile; at Cunningham camp awhile that winter. Tom Harrington's camp was located at the mouth of Elk Creek. I know where the Longley Flats were situated. Tom Harrington was camped on section 21. I don't know what lands were cut over in the vicinity of the Harrington Camp at the mouth of Elk Creek. I worked in the Eckwall Camp in 1886 and 1887. The winter I worked there at the Eckwall camp, we were supposed to cut on sections 19 and 17. Cunningham was in charge of the camp that winter. After I left the Eckwall camp, I worked at Bonner; I worked on the drive after I got there; worked there that winter; I drove that spring and worked at Bonner that summer. I have seen the house now known as J. M. Boles' residence as I was going by on the road; I don't believe I was ever in there; I think



(Deposition of Mike McNamara.)

there was cutting done in the vicinity of the Boles' house—it would be southwest of the Boles house, right in pretty close in the vicinity of where he lived; I cannot fix the distance. I was not interested enough. I think it is pretty close there; I couldn't hardly tell you who did the cutting; there were several camps in there. I think it was Bob Moore, probably it was he. I think it was in 1888 that the cutting was done in there by Bob Moore. I never worked at the Fish Creek camp. I knew where the Sontag ranch was. They cut around in the vicinity of the Sontag ranch house on Fish Creek. I don't remember the year. I have been by the Edgar claim in the vicinity of the Fish Creek camp. I was not present and never saw them ever do any cutting off of [248] the Edgar claim; I was not up the river; I didn't work in there. In the winter of 1888 I worked below Belmont Creek. Our camp was built on 26. We cut and logged on 23 and 25. The logs that were cut during the time that I was working for the Big Blackfoot Milling Company were driven down to Bonner. I don't know of any other mill to which the logs could have gone than the mill at Bonner. I knew of a camp on Longley Flats. Bob Moore, I guess, was the first man who put in a camp there in the spring of 1887. I was not at Moore's camp on Longley Flats when they were doing any cutting; I went through that camp; I did not work there. I went up the trail that time; I know where the camp was located; I know where they cut; they cut on section 29; there was no evi-



(Deposition of Mike McNamara.)

dence of cutting on the Longley Flats when I went up there. This was the same camp that was afterward occupied by Pat Hayes. Pat Hayes put in the balance of that winter cutting. He took Bob Moore's place and he built a camp, he put the logs in the river that winter. I was acquainted with Tom Harrington. I didn't know of him cutting any on the Longley Flats. I think he cut some timber east of there on 21; he didn't cut any timber on 28, that was supposed to be the Longley Flats. I know now he did not cut there. Tom Harrington pitched his tents on 21, that would be the section east of it.

Cross-examination.

During all the time I worked up in the Blackfoot River country for what has been called the Big Blackfoot Milling or the Hammond people, I always got my instructions from W. H. Hammond. I was always instructed that I must respect the lines that had been blazed out and never to cut over them. Mr. Hammond gave me those instructions and to [249] Cunningham that I know of, and whenever I was doing any of the cutting on these different places that I have testified to, I had those instructions; he always cautioned us not to cut any timber, that is, Government timber over the lines; he told me that; he told Cunningham, I heard him. I never cut any over the lines that I know of. I cut a little, I admit I cut some on 26, a few logs to put up a camp; there was no timber cut when I went there. Me and Cunningham cut a little to put in a bridge. That was when I had a contract down there. I cut those logs

(Deposition of Mike McNamara.)

for my own benefit to build a bridge for to go over on to 25, on the other side of the river and I cut some logs to put up a camp. Cunningham and I did that on our own responsibility entirely.

**[Deposition of James M. Boles, for Plaintiff.]**

The deposition of JAMES M. BOLES, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

Direct Examination.

My full name is James M. Boles, and reside about a mile and a half from Missoula. I have lived in the State of Montana about thirty-five years; I am fifty-eight years old. Most of my time my occupation in this state has been that of farming, part of the time mining. I lived at what is known as Sunset Postoffice, in the State of Montana, for twenty-three years. I first went there in '89, I believe. I lived on lots 3, 4 and 5, on the southwest quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 6, township 13 north, range 14 west. I knew where the land known as section 18, township 13 north, range 14 west was situated. I used to have cattle around there. I knew of people cutting and hauling timber off [250] that section. I think it was George Hammond. I would not be positive, but I think it was the year '91 that he cut off that section. I recall the incident of his cutting and hauling the timber off that land, as they had to go through my ranch and they made a road through the ranch. It was

(Deposition of James M. Boles.)

about two years after I came on to the ranch that this cutting was done.

Q. Were you familiar with the price of sawed lumber in that vicinity from the year 1889 up to 1892 and 1893?

A. Well, of course, I bought a little lumber, I could not say positively, but I think I paid \$10.00 per thousand feet for it.

Cross-examination.

I believe I could swear positively that it was the northwest quarter. I had run the lines for the ranch. I owned 160 acres in section 6. Section 18 lies south of 6, with one section between them. I know this quarter section of 18 was cut because of the stumps around it. I don't think there has been anything cut off the northeast quarter or the south half of that section. The only timber that has been cut off of section 18 is the northwest quarter. That was the case on the first day of March of this year. I know by the corners that it was the northwest quarter of section 18. I found the corner of section 7. I don't know as there was a quarter corner on the west line of section 18. I never run out the west line of section 18. I found the northwest corner of sections 7 and 18. I was not looking for corners, just simply riding through there hunting cattle. I did not run out any line. I did not find the center of section 18. I have hunted over there a great deal. My testimony is based on my impressions from long ago [251] when I was living at Sunset Postoffice, that the timber that was cut on that was cut on the



(Deposition of James M. Boles.)

northwest quarter of 18. While I lived there my cattle ran on 7 and 18. I bought a quarter section on 12, cornering on section 18. I had to run the line to section 7 here. My quarter lay in the east half of the southwest quarter and the west half of the southeast quarter, in the middle of the section, that left a quarter of a mile between 18 and my corner. I had to find the corner of 7 and 18 in order to find my line, my corner. I bought this land seven years ago. All of section 7 is cut except the strip on the east side that comes in above the quarter corner of 18. Section 18 was cut first. Section 7 was cut in the fall of '92 and '93, I think. It was cut after section 18. It was cut by a different contractor. I claim G. L. Hammond cut the northwest quarter of section 18. There is nothing else cut on that section. Sections 12 and 13 of the township adjoining on the west were cut the same time as section 7 was. It was all cut off by Pat Dunnigan. I run out the lines to the southwest corner of section 18. I ran from the corner of 7 to the southwest corner of 18. That was the western boundary of section 7. I ran the line from the northwest corner of section 7 down to the southwest corner of section 18, and the south line over to the north corner of 20. I told you I ran that line about 7 years after I bought that place. I am pretty sure that the timber was cut in '91, and the timber was cut when I ran the line. I know where the northwest quarter of section 18 is, but I have not run the boundaries clear around that. I have run only one of the lines that bounds the northwest quar-



(Deposition of James M. Boles.)

ter. I know that the northwest quarter lies on one side of the line I ran, but that is all I know. [252]

Redirect Examination.

I have been familiar with the northwest quarter of section 18, township 13 north, range 14 west, for twenty-two years. I acquired my familiarity with it because my cattle ran on sections 7, 18, 12 and 13. I have lived within a mile and a half of section 18 for twenty-three years. I never knew the northwest-quarter of section 18 as the Kelly claim.

Recross-examination.

I never knew of a man named Kelly living on that northwest quarter of section 18. I never saw anyone living there. I swear that George L. Hammond cut the northwest quarter of section 18 about October 24, 1896. I don't remember seeing G. L. Hammond around there at that time. He lived right by me at Sunset in 1891 and '92. I want to be understood as testifying that all the timber was cut off of the northwest quarter of section 18 in 1891. I know that Hammond located up there on 18, and that he drove the logs down through my place. I also know that the northwest quarter is the only quarter that was cut on section 18. At the time George Hammond cut this he lived on section 1 in the next township. I saw the men going up there to cut on the northwest quarter of section 18. They went from George Hammond's farm on section 1, in 13-15. I know it was soon after I went on the ranch, the next year or two following; that is all I know, but I think

(Deposition of James M. Boles.)

it was in 1891-2. Of course they cut all winter. George Hammond was living on section 1 when I went there. A man by the name of Demons was his foreman. [253]

**[Deposition of C. H. McLeod, for Plaintiff.]**

The deposition of C. H. McLEOD, a witness called and sworn on behalf of the plaintiff, was offered and read in evidence by the plaintiff, as follows:

**Direct Examination.**

My full name is Charles Herbert McLeod. I reside at Missoula. I am fifty-three years old and have resided in Missoula since March 29, 1880. I am president of the Missoula Mercantile Company and have been such since the year 1908. It was in March, 1880, that I first entered the employ of the Missoula Mercantile Company. The Missoula Mercantile Company was not incorporated at that time. Eddy-Hammond & Company was the name of the firm that I went to work for. The firm of Eddy-Hammond & Company was a copartnership, composed of R. A. Eddy, A. B. Hammond and E. L. Bonner. I don't know what interest A. B. Hammond had in the firm of Eddy-Hammond & Company when [254] I first entered their employ, but I think he was a third owner. At the time I entered the firm, Mr. Hammond and Mr. Eddy were running the concern. At that time Mr. Bonner was living in Deer Lodge; he had a store in Deer Lodge and also had a store in Butte. Mr. Hammond did not control the firm. Some of its affairs he man-

(Deposition of C. H. McLeod.)

aged and others Mr. Eddy managed. Mr. A. B. Hammond's duties were buying and selling merchandise. The firm of Eddy-Hammond & Company was engaged in the general merchandise business. At that time that was the only business in which they were engaged. It was in 1881, I think, that Eddy-Hammond & Company contracted with the Northern Pacific Railroad Company for a certain amount of bridge timber and ties and clearing the right of way for a distance of about two hundred miles during the construction days of the Northern Pacific—about that I don't know exactly. They contracted to furnish ties and bridge timber for the construction of that road. I think that contract ended about Jan. 1, 1883. They operated, I think, during that time from Drummond to Cabinet, that is about two hundred miles around here. Most of the work was west of the town of Missoula. I don't know whether any of it was near the town of Bonita. I don't believe Eddy-Hammond & Company operated in the vicinity of Bonita at that time, with the exception that they might have made a contract for some railroad ties. They were not operating any mill at any place during that time, that I know of. They procured their timber by contracting for same between 1881 and 1883 with some mills in different sections of this country along the line of the Northern Pacific that was being constructed at that time. I remember the Fred Hammond Mill near the present town of Bonita, but don't remember exactly the year. I don't know whether any [255] of the



(Deposition of C. H. McLeod.)

timbers that were furnished by the firm of Eddy-Hammond & Company to the Northern Pacific Railway under this contract were sawed and cut at the Bonita Mill. I don't know who erected the Fred Hammond Mill at Bonita, unless it was the Montana Improvement Company. The Missoula Mercantile Company was incorporated in August, 1885. The Missoula Mercantile Company succeeded and acquired the interests of Eddy-Hammond & Company, that is to say, the business was taken over. The firm of Eddy-Hammond & Company was not engaged in the lumbering business at that time. They had retired from it. I was not a member nor a stockholder of the corporation known as the Montana Improvement Company; nor was I employed by it. I think Mr. Winstanley, who is dead now, was in charge of the books of the Montana Improvement Company from the time it was organized up until it went out of existence. The Montana Improvement Company was organized in the fall of 1882 or the spring of 1883, and took over all the lumber interest that had been conducted by Eddy-Hammond & Company prior to January 1, 1883. I think Mr. A. B. Hammond was a stockholder of the Montana Improvement Company. I don't know what his position was in reference to the management of the affairs of the Montana Improvement Company. I think Mr. Bonner was president, and I think Mr. Eddy was vice-president; I don't know what position Mr. Hammond had and I am not sure who the officers were. I don't remember how long the Mon-



(Deposition of C. H. McLeod.)

tana Improvement Company continued in active lumber business. I think they discontinued business in the year 1885. I am not quite positive about that. Nobody succeeded the Montana Improvement Company, that I know of. As to what became of the interests of the Montana Improvement Company in 1885, I think they disposed of them to different [256] parties and got out of the lumber business. I cannot say to whom they disposed of their interests. I think they were sold to different parties, different holdings. A. B. Hammond did not take over any of the interests of the Montana Improvement Company when it was dissolved. I was a stockholder in the company known as the Blackfoot Milling and Manufacturing Company. I have forgotten who were the officers and stockholders of that company. I think Mr. Bonner was the president; I think Mr. A. B. Hammond was a stockholder in that company. I think that company was organized in 1888. It manufactured timber, I think, in the Bitter Root Valley and I think they owned the Blackfoot Mill, I am not sure, and leased it to W. H. Hammond. The Blackfoot Mill was erected at Bonner in 1885 or 1886 by W. H. Hammond. The Blackfoot Milling and Manufacturing Company acquired the Bonner mill in 1888 or 1889. I think it leased the mill for several years to W. H. Hammond, between three and four years, I am not positive. After the Montana Improvement Company ceased to operate, I think G. W. Fenwick conducted the mill at Bonita. The Missoula Mercantile Company had

(Deposition of C. H. McLeod.)

an account with G. W. Fenwick while he was running the Bonita Mill. I think the Missoula Mercantile Company sold them merchandise. I don't remember whether it took care of orders issued by Fenwick for labor in getting out lumber and timber for use about the Bonita Mill. As to the way their business was conducted and how the accounts were kept between Fenwick and the Missoula Mercantile Company, Fenwick bought merchandise and paid for the merchandise himself with checks and one thing and another. I don't know whether Mr. Fenwick was accustomed to issue orders on the Missoula Mercantile Company for labor and for the amount that was due the various men who worked there. I know a great many mills [257] and a great many operations that were carried on in Western Montana have been financed by the Missoula Mercantile Company. To what extent the Fenwick operations were financed by the Missoula Mercantile Company, I don't remember. I know we sold them merchandise; to what extent we paid orders, I don't remember, we may have done so. Mr. Fenwick made the arrangement between him and the Missoula Mercantile Company by which his account with the company was taken care of. So far as the Missoula Mercantile Company is concerned, I have an idea that the account was *arrange* for by the board of directors, they generally arranged about those matters, such large matters the board passes on. I think Mr. A. B. Hammond was a member of the board of directors at that time. During the time the

(Deposition of C. H. McLeod.)

Missoula Mercantile Company carried the account of George W. Fenwick, including the operations of Fenwick at Fred Hammond's mill, at Bonita, A. B. Hammond was a director of the company. I don't know whether he occupied any other position or not at that time. The Missoula Mercantile Company never had any interest in a mill known as the Bonner Mill that had been constructed by W. H. Hammond, nor do I remember of it ever at any time owning any sawmill or having any interest in any sawmill in the State of Montana. I don't know whether the Missoula Mercantile Company ever paid taxes on the Bonner Mill at any time between the years 1885 to 1892. I don't remember any contract of any kind. I don't think the Missoula Mercantile Company ever paid any taxes on any other sawmill during the years mentioned. There were different persons in charge of the tax matters relating to the Missoula Mercantile Company during the years from 1885 to 1892. I think Mr. J. M. Keith, from 1885 to 1888 or 1889, and I think Mr. Moser came in there as secretary of the company and looked after the taxes from that time on to 1895. During the times [258] these gentlemen were looking after the assessments; I suppose they were referred to the directors before the taxes were paid, but they had charge of the assessments and looked after the business, putting in our property, and it was approved by the Board of Directors, I suppose those things generally are. As a general rule, the assessment list would be finally approved by the Board of Directors



(Deposition of C. H. McLeod.)

before it was handed to the County Assessor. I was a stockholder in the Big Blackfoot Milling Company but had nothing to do with the management of the affairs. W. H. Hammond had charge. A. B. Hammond was a director and member of that company. I don't know what other position he occupied. He didn't manage that company, Mr. W. H. Hammond always managed it. I think it was about 1890 that company was incorporated, but I am not sure of that. It engaged in lumbering operations on the Big Blackfoot from the time they incorporated until they sold out to Mr. Daly in 1898, but I don't remember the date of the incorporation. I think the Big Blackfoot Milling Company succeeded to the interests of the Blackfoot Milling and Manufacturing Company. W. H. Hammond was in active charge and management of the affairs of the Big Blackfoot Milling Company after its incorporation.

Q. Was there any change in the management of the Bonner Mill from the time it was erected by W. H. Hammond until it was sold to the Daly interests in 1898?

A. As I remember, W. H. Hammond built the Blackfoot Mill and operated for several years. I think some years later, I have forgotten what year, the Big Blackfoot Milling and Manufacturing Company was organized, when W. H. Hammond, as I remember it, I only know from hearsay, disposed of a portion [259] of the interests to different parties, and then I think leased from the Blackfoot Milling and Manufacturing Company for a number of



(Deposition of C. H. McLeod.)

years that property, at a certain rental, what rental I do not know. Afterwards the Blackfoot Milling and Manufacturing Company also owned some interest in the Bitter Root Valley; later on they were amalgamated and a company organized. Now, the Big Blackfoot Milling Company, W. H. Hammond became its manager on a salary and operated the mill from that time until they sold to Mr. Daly in 1898—that was my understanding.

Q. Who was in active charge of the work being conducted at the Bonner Mill from the time it was established in 1885 up until the mill was sold to the Daly interests in 1898?

A. W. H. Hammond was the active—W. H. Hammond owned it and run the mill for himself for several years; he afterwards leased it from the Blackfoot Milling and Manufacturing Company and paid the company rental for the use of the mill, and then the Big Blackfoot Milling Company was organized. W. H. Hammond became its president and run the mill on a salary and owned a portion of the stock, I think about a quarter of the stock, I do not know what amount of the stock he had.

(Witness Continuing:) I did not have anything to do with the sale from W. H. Hammond to the Blackfoot Milling and Manufacturing Company of the Bonner Mill. I don't remember of seeing any of the contracts or title papers by which the ownership was changed at that time. I think I was president of the Blackfoot Milling and Manufacturing Company for a time; I don't know how long a period, and I

(Deposition of C. H. McLeod.)

think I signed a lease as president of the company; I don't remember what the terms of that lease [260] were now. I don't know where that lease is at this time, but I think Mr. Burnett has that lease.

Mr. BURNETT.—I think I have it here. No, sir, I haven't it here.

Mr. HALL.—Will you produce it?

Mr. BURNETT.—Yes, sir.

(Witness Continuing:) I do not know of my own knowledge the amount of stock that A. B. Hammond owned in the Montana Improvement Company or in the Blackfoot Milling and Manufacturing Company, or in the Big Blackfoot Milling Company. I do not know whether the Missoula Mercantile Company owned any stock in the Montana Improvement Company. I do not think the Missoula Mercantile Company owned any stock in the Blackfoot Milling and Manufacturing Company; I do not think it did in the Big Blackfoot Milling Company. The Montana Improvement Company did not own any stock in the Missoula Mercantile Company; neither did the Blackfoot Milling and Manufacturing Company; neither did the Big Blackfoot Milling Company.

(Here the attention of the witness was directed to a tabulation of the stockholders and the amount of stock held by each in the Missoula Mercantile Company.)

(Witness Continuing:) I think this statement is correct.

Mr. HALL.—I have some records here that are

(Deposition of C. H. McLeod.)

very long and voluminous; they are the records from the stock books of the Missoula Mercantile Company, showing that Mr. A. B. Hammond was a stockholder from the time that company was organized, August 20, 1885, right up until October, 1891; then there is another list showing his holdings from October, 1891, on up until [261] October 27, 1898.

Mr. WELLER.—Those statements were prepared for you and given to you?

Mr. HALL.—Yes.

Thereupon plaintiff offered and read in evidence the said records, statements or schedules taken from the stock books of the Missoula Mercantile Company, which said records, statements or schedules are in the words and figures following to wit:

STOCKHOLDERS OF MISSOULA MERCANTILE COMPANY,

From August 20, 1885, to October 24, 1891.

Stockholders.	Aug. 20/85 issue Original	Sept. 3/85	Jan'y. 30/88	July 17/88 Capital stock increased to \$300,000.00	Sept. 20/88	June 17/90	Sept. 9/90 Capital stock increased to \$600,000.00	Octr. 24/91
Richard A. Eddy	832	265	375	265	265	265	530	530
Andrew B. Hammond	832	265	265	285	285	510	1020	1120
Edward L. Bonner	832	166	236	166	166	34	68	68
George T. Scully	1	1						
Charles H. McLeod	1	101	101	201	201	840	1680	1680
Thomas G. Hatheway	1	1	1	1	31	100	200	200
John M. Keith	1	101	102	102	102	102	204	204
Mrs. Edwinna M. Eddy		500	620	620	590	223	446	346
Mrs. Florence Hammond		300	300	300	300	300	600	600
Edwinna C. Hammond		50	50	50	50	50	100	100
Florence Hammond		50	50	50	50	50	100	100
Richard E. Hammond		50	50	50	50	50	100	100
Leonard C. Hammond		50	50	50	50	50	100	100
Charles E. Bonner		200	200	200	200			
Mrs. Caroline S. Bonner		200	360	360	360	253	506	506
Lenita J. Bonner		200	200	200	200			
I. S. G. Van Wart			20					
Harry T. Van Wart			20	20	20	20	40	40
Harry C. Keith				20	20	20	40	40
T. C. Power & Brother				60	60			
Bessie A. Bonner						133	266	266
	2500	2500	3000	3000	3000	3000	6000	6000

October 24, 1891:

Capital Stock increased to \$1,200,000. All stock returned for cancellation and new stock issued as follows: [262]

First Preferred	3000	shares.....	\$300000.00
Second	"	3712 "	371200.00
Common	"	5288 "	528800.00
			<u>\$1200000.00</u>





Capital Stock reduced to \$850,000.00 All stock returned for cancellation and common stock issued for \$850,000.00. [263]

Thereupon plaintiff offered and read in evidence the Minute-book, including the By-Laws and Amendments thereto, of the Missoula Mercantile Company, commencing with August 19, 1885, up until the latter part of 1894. The said Minute-book, By-laws and Amendments thereto, are in the words and figures following, to wit:

**[Exhibit—Minute-book of Missoula Mercantile Co.,  
etc.]**

“Missoula, Montana, August 19th, 1885,  
9 o'clock A. M.

A meeting of the Trustees named in the Articles of Incorporation of the ‘Missoula Mercantile Company,’ was held on this 19th day of August, 1885, for the purpose of organization under the Charter of said Company.

The said meeting was called to order by Andrew B. Hammond, who upon motion of John M. Keith was made Chairman of the Meeting and John M. Keith was elected Secretary thereof.

The Chairman of the meeting announced that the first business before the meeting was the election of a President and Vice-President to serve for the three months for which the Trustees named in the Charter were to serve. Whereupon the Chairman appointed Thomas G. Hathaway and Richard A. Eddy as Tellers and the said Trustees proceeded to cast their ballot for President, when after counting

said ballots said Tellers reported that Andrew B. Hammond had received a majority of the votes cast for President and he was declared elected President of said Company.

Whereupon the said Trustees proceeded to cast their ballots for Vice-president, when after counting said ballots the Tellers reported that Richard A. Eddy had received the majority of the votes cast and he was declared duly elected.

The President then announced that the books for the subscription to the capital stock of said Missoula Mercantile Company were now open whereupon the following subscriptions were entered as follows:

[264]

Andrew B. Hammond.....	832	shares
Richard A. Eddy.....	832	“
Edward L. Bonner.....	832	“
Charles H. McLeod.....	1	“
John M. Keith .....	1	“
Thomas G. Hathaway.....	1	“
George T. Scully.....	1	“

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2500 shares.

whereupon the President announced that all the stock of said Company was subscribed for.

Upon motion of John M. Keith, the President, Vice-president and Thomas G. Hathaway were appointed a Committee on By Laws, to report to an adjourned meeting of this board.

There being no further business the meeting was adjourned to meet at seven o'clock P. M. to receive

the report of the Committee on By-Laws.

A. B. HAMMOND,  
President.  
JOHN M. KEITH,  
Secretary.

Missoula, Montana, August 19, 1885.

7 o'clock P. M.

The meeting of the adjourned Trustees meeting of the "Missoula Mercantile Company" was called to order by the President. There being present President, Vice-president, John M. Keith and Thomas G. Hathaway.

Mr. Eddy from the Committee on By-Laws presented the following By-Laws for the approval of the Trustees. [265]

#### BY-LAWS.

Sec. 1. The officers of the Company shall be a President, Secretary, Treasurer and Manager and a Board of six Trustees.

Sec. 2. The President and Vice-President shall be elected by the Board of Trustees at the first meeting after their election, and from their own number and they shall hold office until the next annual meeting of the stockholders or until their successors shall be elected and qualified.

Sec. 3. At the same meeting of said Board at  
Altered.  
See page  
23. which the President and Vice-President are  
elected, the President shall appoint a Secretary and a Treasurer, whose appointments shall be approved by the Board.



Sec. 4. In addition to the above officers there shall be a Manager, who shall also be appointed by the President at the first meeting of said Board and approved by the Board of Trustees.

Altered.  
See page  
23.

Sec. 5. The President shall preside at all meetings of the Board of Trustees and the stockholders: He shall act as Inspector of all elections of Trustees and certify who are elected Trustees: He shall sign all deeds and contracts on behalf of the Company, and all certificates of stock of the Company. He shall at each annual meeting of the stockholders make a report to the stockholders of the state of the business of the Company. He shall have general charge and supervision over all the business of the Company and over all its officers and employees. All appointments of subordinate employees shall be subject to his approval. [266]

Sec. 6. The Vice-President shall assist the President, shall preside at all meetings of the Board or of the stockholders at which the President is not present, and during the absence of the President or his inability to act shall possess the same powers and perform the same duties.

Sec. 7. The Secretary shall keep a fair and correct record of the proceedings of all meetings of the Board and of the stockholders and all other official business of the company: He shall attend to the giving and serving of all notices to the Trustees or stockholders or otherwise required by law. He shall have charge of the stock book and stock certificate book, and of the Transfer book, Registration of

Transfers, and issue of new stock certificates. He shall attend to the general correspondence of the Company and perform such other duties as are incident to the office of secretary or may be assigned to him by the Board.

Sec. 8. The Treasurer shall have charge of all the moneys, securities for money, and other assets of the Company but shall deposit so much of the moneys coming into his hands as is not required for the immediate current purposes of the Company with a Bank or Bankers designated by the Board in the name of the Company. He shall keep a correct and full account of all moneys received and distributed by him or on his account or upon his order, and of all securities or other assets received or delivered by him. He shall render a statement of his cash account at each regular meeting of the Board, and shall perform such other duties as are incident to the office of Treasurer. The Board may from time to time fix the amount of cash to be kept in hand by him. [267]

Sec. 9. The Manager shall have general charge of the business under the supervision of the President, and direction of the Board. The Manager shall appoint (subject to the ratification of the President and at the pleasure of the President), all subordinate agents.

Sec. 10. The Trustees may from time to time adopt general regulations for the transaction of the Company's business, the appointment and duties of subordinate officers, the purchase of supplies and materials and the keeping of the accounts. Such

general regulations when adopted shall only be altered or rescinded by a vote of a majority of all the Trustees at a special meeting of the Trustees called for that purpose.

Sec. 11. The salaries of President, Vice-President, Secretary, Treasurer, and Manager and all subordinate agents shall be fixed by the President and approved by the Board of Trustees.

Sec. 12. No payments shall be made or other assets delivered over except upon the written order or draft of the President or Manager, and all checks upon the Company's Bankers shall be signed by the Treasurer, but the salaries and wages of all officers and employees may be paid by the Treasurer and the same regularly entered upon the books of the Company, without order for the separate amounts.

Sec. 13. There shall be selected from the Trustees an Executive Committee composed of three persons who shall be named by the President and approved by the Trustees, whose duties it shall be in the absence of regular meetings of the Board to perform all the duties, and do all things that might be done by the full Board when in regular session and the President of this Company shall be Ex-officio Chairman of said Executive Committee. **[268]**

Section 14. Four trustees shall form a quorum for the transaction of any business of all regular meetings of the Board, \*except for the alteration or amendment of these By-Laws,\* and any vacancies

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\*The words "Except for the alteration or amendment of these By-Laws" were inserted before the adoption of these By-Laws. See line three, Section fourteen.



occurring in the Board by death, resignation, disqualification or incapacity to act shall be filled by the remaining Trustees and the Trustees so elected shall hold office until the next annual meeting and until his successor is elected and qualified. The majority of any Committee may act and may determine the time and place of meeting.

Sec. 15. The annual meeting of the stockholders shall be held on the first Monday in September of each year at the principal office of the Company at 12 o'clock noon at which the Board of Trustees shall be elected and the annual report of the President submitted and published and the Trustees chosen shall hold their office for one year thereafter, and it shall be the duty of the Secretary to give notice of the annual meeting of the stockholders by publication stating the time and place of meeting in some newspaper published and printed in Missoula, Montana, for at least ten days prior to such meeting.

Sec. 16. At all stockholders meetings the vote in person or by proxy of a majority in amount of all the stock of the company shall be necessary for an election or for the passage of any resolution, except one for the adjournment of any meeting to some other date. No notice shall be necessary for the holding of any adjourned meeting, and such adjourned meeting may be held at any time and place the stockholders present at the original meeting may determine.

Sec. 17. At all meetings of the stockholders each stockholder shall be entitled to as many votes as the number of shares held by him multiplied by the



number of Trustees to be chosen, and may cast all their votes for one candidate or distribute them as [269] he sees fit, and the person receiving the greatest number of votes shall be declared elected.

Sec. 18. Any stockholder may vote by proxy but such proxy shall be appointed by writing subscribed by such stockholder and filed with the Secretary at or before the time the vote is tendered. Such proxy may either be for such particular or for all meetings until revoked, and unless the contrary is stated therein the appointment of a proxy shall entitle the proxy to vote all meetings thereafter at which the stockholder is not present and until such proxy is cancelled or revoked by writing subscribed by the stockholder and filed with the secretary.

Sec. 19. The Secretary shall prepare and submit to every stockholders meeting, a certified list of all the stockholders of the Company and of those entitled to vote at such meetings and such list shall be "*prima facie*" evidence of the right to vote; and shall also produce the stock book whenever required by any stockholder so to do.

Sec. 20. No person is eligible to the office of Trustee unless he is a stockholder, and if he ceases to be a stockholder he ceases to be a Trustee.

Sec. 21. Any Trustee may hold any other office together with that of Trustee, and any two offices may be held by the same person (except those of President and Vice-President).

Sec. 22. A special meeting of the stockholders shall be called by the Secretary when so required, either by the Board of Trustees or the holders of one-

third of all the stock. Notice of such meeting shall be delivered to, or mailed to the address of every stockholder so as to be received at least ten days previous to the day of such meeting, stating the time of such meeting, and the object thereof. If the Secretary shall neglect [270] to convene such meeting for one week after notice in writing so to do has been served upon him, any Trustee or stockholder may himself do so.

Sec. 23. The shares in the capital stock of the Company shall be represented by stock certificates signed by the President, and attested by the Secretary. All certificates shall be bound in a book and shall be issued in consecutive order therefrom, and shall be numbered and registered in the order in which they are issued, and on the stub of each issued shall be entered the name of the person owning the share therein represented with the number of shares and the date thereof, and the person receiving this certificate shall sign on such stub a receipt for the certificate issued to him. All certificates exchanged or returned to the Company shall be cancelled by the secretary and such cancelled certificates pasted in their original place in the stock book, and no new certificates shall be issued until the old certificate has been thus cancelled and returned to its original place in such stock book.

Sec. 24. If any certificate be accidentally destroyed the Board may, upon proof of such loss and destruction and the giving of a proper bond of indemnity to their satisfaction by the stockholder, authorize the issue of a new certificate as a duplicate

bearing the same number.

Sec. 25. The transfer of stock shall be made only upon the books of the Company by the holder in person, or by power of attorney duly executed and filed with the Secretary of the Company, and on surrender of the certificate or certificates [271] of such shares, but no transfer shall be valid until the same has been entered upon the Books of the Company, and the party transferring said stock shall have made good all claims to the Company against him in person or against the shares of stock so held by him unless by consent of the Trustees. Every stockholder and Transferee shall furnish the Secretary with an address at which notices of meetings or other matters may be served upon or mailed to him and in default shall not be entitled to service of such notice.

Sec. 26. The stock book of the Company shall be kept by the Secretary in such a manner as to show intelligently the original stockholders their respective shares, the amount paid and the amounts due thereon, and all transfers thereof.

Sec. 27. The stock book, stock certificate book as well as all other books of the Company shall be subject to the inspection at all reasonable hours to any stockholder.

Sec. 28. The Secretary shall also keep a transfer book in which he shall register all transfers of stock, and the names and addresses of the transferees. Such transfer book shall be closed for ten days previous to and on the day of the annual meeting of the stockholders.



Sec. 29. The said Missoula Mercantile Company shall begin to take stock of all their goods and property (on the first) of January of each year, and a report of the same made to all the stockholders.

Altered.  
See page 24. Sec. 30. Dividends must be declared and paid to the stockholders on the First day of February of each year, after the stock had been taken, to the full amount of the net profits, provided [272] the net profits do not exceed ten (10) per cent of the capital stock. In the event of an excess of the net profits over Ten (10) per cent of the Capital Stock the said Company shall declare a further dividend to the full amount of the net profits to be paid at the option of said Trustees *pro rata* in Bonds of said Company bearing interest at the rate of seven (7) per cent per annum, payable not less than one year from date and to run not longer than five years.

The erasure of the words "Upon a vote of a majority of the Trustees" on lines ten (10) and eleven (11) Section thirty (30) was made before the adoption of these By-Laws.

A. B. HAMMOND—President,  
JNO. M. KEITH—Secretary.

Sec. 31. At any stockholders meeting after the President's report to the stockholders has been made of the preceding year's business and it is found that the net profits do not exceed Five (5) per cent of the Capital Stock a majority of the stockholders may demand that the business of said Missoula Mercantile Company shall be closed out under the management of the Board of Trustees and as they may deem best, but should the remaining stockholders desire to continue the business they may do so upon purchasing the stock held by the stockholder or stockholders wishing to sell their said shares at their par value.



Sec. 32. No deed, instrument or contract of any description purporting to be made on behalf of the Company, except in relation to the ordinary routine of the business of the company and except as provided in section 12 of these By-Laws shall be valid unless authorized by the Board of Trustees, and no instrument [273] shall be deemed to have been duly executed on behalf of the Company unless signed by the President and attested by the Secretary with seal.

Sec. 33. A monthly statement of the preceding month's business shall be furnished to each stockholder holding not less than one hundred (100) shares of stock if called for.

Sec. 34. These By-Laws shall be altered or amended only by the unanimous vote of all the Trustees at a regular meeting of the stockholders called for that purpose.

Upon motion of J. M. Keith the foregoing By-Laws were adopted and the Committee discharged.

There being no further business the meeting adjourned to meet again at 9 o'clock A. M. on the 20th inst.

A. B. HAMMOND, President.

JOHN M. KEITH, Secretary.

Missoula, Montana, August 20th, 1885,

9 o'clock A. M.

Pursuant to adjournment the Board of Trustees of the Missoula Mercantile Company met. There being present, President A. B. Hammond, Vice-President R. A. Eddy, John M. Keith and Charles H. McLeod.

Messrs. Eddy Hammond & Co. came before said

meeting and made an Exhibit of certain goods, wares, merchandise, real estate, Book Accounts, notes, etc., and offered to sell the same to the Missoula Mercantile Company at the price of Three hundred and thirty one thousand and Nine hundred and Seventy one 14/100 (331971.14) dollars, after full discussion and examination [274] the said Board agreed to and hereby does purchase from said Eddy Hammond & Co. their business, goodwill, goods, wares, merchandise, Book of Accounts, Notes, Real Estate, etc., at the said price of Three hundred and thirty one thousand Nine hundred Seventy-one 14/100 (\$331,971.14) dollars, and paying thereon the sum of Two hundred and fifty thousand (\$250,000.00) dollars, and the balance of said purchase price to be paid by the said Missoula Mercantile Company assuming the indebtedness of said Eddy Hammond & Co. to the various parties which it hereby agrees and obligates itself to pay, and to save the said Eddy Hammond & Co. harmless on account of such indebtedness, in the sum of Eighty one thousand Nine hundred and Seventy-one 14/100 (\$81,971.14) dollars, Eddy Hammond and Co. proceeding to make good and sufficient deed of all said Real Estate to the Missoula Mercantile Company, and will deliver to its proper officers the possession of all of said property, books, notes, accounts, etc., hereinbefore purchased. The following being a statement presented to the meeting:

“Statement of Property sold to the Missoula Mercantile Company by Eddy Hammond & Co.

August 20th, 1885.

Real Estate.....	\$ 43000.00
D. Goods Mdse.....	41518.77
Grocery Mdse.....	18553.37
Hdwe. Mdse.....	28848.98
Bills Receivable.....	27774.33
Store Furniture.....	2000.00
Cash with H. B. Claflin & Co....	9142.00
Sundry account.....	161133.69

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 \$33197.14''

[275]

Upon motion of Charles H. McLeod the itemized statement of sundry accounts purchased and the liabilities assumed by said Missoula Mercantile Company was ordered filed with the secretary.

The President then announced that he had made the following appointment subject to the approval of the Trustees—viz.: Manager, Charles H. McLeod, and for Secretary and Treasurer John M. Keith, when upon motion of R. A. Eddy the appointments were confirmed.

There being no further business before the meeting it was adjourned.

A. B. HAMMOND, President.

JOHN M. KEITH, Secretary.

Missoula, Montana, August 22, 1885.

A meeting of the Board of Trustees of the Missoula Mercantile Company was held on this day at the office of said Company, at 12 o'clock noon, there being present Mr. President, R. A. Eddy, John M. Keith, and Edward L. Bonner.

Messrs. Eddy Hammond and Co. came before said meeting and made an Exhibit of certain goods, wares, merchandise, Real Estate, Book accounts, Notes, and Building in Stevensville, Montana, known as their Stevensville Store and offered to sell the same to the Missoula Mercantile Company at the price of Eleven Thousand Seven hundred and three 10/100 (\$11,703.10) [276] dollars, and after full consideration of the matter the said Board agreed to and hereby does purchase from said Eddy Hammond & Co. their business, goodwill, Goods, Wares, Merchandise, Books of accounts, Notes, Real Estate, Building, etc., at Stevensville at the said price of Eleven Thousand Seven hundred and three 10/100 (\$11,703.10) dollars, and paying thereon the sum of \$1,416.60 and the balance of said purchase price to be paid by said Missoula Mercantile Company assuming the indebtedness of said Eddy Hammond and Co. Stevensville Store to the various parties, which it hereby obligates itself to pay and to save the said Eddy Hammond & Co. harmless on account of such indebtedness in the sum of Ten Thousand Two Hundred and Eighty-six 50/100 (\$10,286.50) dollars. Eddy Hammond & Co. proceeding to make good and sufficient deed for said Real Estate to said Missoula Mercantile Company, and to deliver to its proper officers the possession of all of said property books, notes, accounts hereinbefore purchased. The following being a summary of the statement of the property sold to the Missoula Mercantile Company by



Eddy Hammond & Co., Stevensville, Aug. 22/85.

Book Accts., Merchandise, Bills Rec., etc. . . \$10,286.50

Real Estate and Building . . . . . 1,416.60

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\$11,703.10

Upon motion the President ordered that the Exhibit presented by Eddy Hammond & Co. be filed with the secretary for future reference.

There being no further business, the meeting adjourned.

A. B. HAMMOND, President.

JOHN M. KEITH, Secretary. [277]

Missoula, Montana, November 20th, 1885.

Pursuant to a notice published in the "Missoulian" newspaper and according to the by-laws the first meeting of the stockholders of the Missoula Mercantile Company was held at the office of said company at Missoula, Montana, on Friday, November 20th, 1885, at 12 o'clock Noon; there being present A. B. Hammond, R. A. Eddy, J. M. Keith, C. H. McLeod, G. T. Scully, Mrs. A. B. Hammond by proxy, Mrs. R. A. Eddy by proxy, and Edwina C. Hammond, Florence Hammond, Richard E. Hammond, Leonard C. Hammond, by their guardian, A. B. Hammond.

The meeting was called to order by the President and J. M. Keith was duly elected Secretary of the meeting.

On motion of R. A. Eddy the following preamble and resolution was adopted: "Whereas the three months having expired during which the Trustees named in the certificate of incorporation are by law to manage the affairs of the company, therefore be it

resolved: That the affairs and management with the subscription books and assets be turned over to the stockholders."

Whereupon the following motion was unanimously carried: That the stockholders of the Missoula Mercantile Company do now proceed to elect a Board of six Trustees to manage its affairs until the next regular annual meeting or until their [278] successors shall be elected and qualified. Whereupon the stockholders proceed to cast their ballots for the six Trustees, and upon the ballots being counted the tellers announced that the following persons had received a majority of the votes cast and are duly elected Trustees of said company to manage its affairs until the regular annual meeting of stockholders, viz.:

E. L. Bonner.

J. M. Keith.

R. A. Eddy.

C. H. McLeod.

A. B. Hammond.

G. T. Scully.

There being no further business before the meeting it adjourned.

A. B. HAMMOND, President.

JNO. M. KEITH, Secretary.

Missoula, Montana, November 20th, 1885.

A meeting of the first Board of Trustees was held at the office of the Missoula Mercantile Company at Missoula, Mt. on Friday, Nov. 20th, 1885, at 2 o'clock P. M., there being present Andrew B. Hammond, Richard A. Eddy, John M. Keith, Charles H. McLeod and George T. Scully.

Upon motion Andrew B. Hammond took the chair and J. M. Keith was duly elected Secretary *pro tempore*.

The chairman announced that the first business before the meeting was the election of one President and one Vice-President. [279] Whereupon the Trustees proceeded to cast their ballots for President and Vice-President, and after the count of the ballots the tellers announced that Edward L. Bonner had received five (5) votes for President and Andrew B. Hammond had received five (5) votes for Vice-President and upon motion they were declared duly elected.

In the absence of the President, the Vice-President appointed the following Executive Committee of the Board of Trustees in accordance with By-law No. 13, viz.: A. B. Hammond, C. H. McLeod and J. M. Keith and upon motion of R. A. Eddy the Board of Trustees confirmed the appointment of said Executive Committee.

In the absence of the President, the Vice-President appointed Charles H. McLeod, Manager, John M. Keith, Secretary and John M. Keith, Treasurer. When upon motion of G. T. Scully the appointments named above were confirmed by the Board of Trustees.

There being no further business before the meeting it was adjourned.

A. B. HAMMOND, Vice-President.

JNO. M. KEITH, Secretary.

Missoula, Montana, August 31, 1886.

Pursuant to notice given to each of the Trustees there was a meeting of the Trustees of the Missoula Mercantile Company held at the office of said company this date at 2:30 o'clock P. M.: All of the Trustees being present.



Edward L. Bonner, President, occupied the chair, and [280] stated the object of the meeting, whereupon Richard A. Eddy offered the following preamble and resolution: Whereas it appears that certain of the By-Laws of this company do not tend to the promotion of the best interests of the company: Be it therefore Resolved that Sections Nos. 3-4-11-13 and 30 of said By-Laws be altered and amended to read as follows:

Sec. 3. At the same meeting of said Board at which the President and Vice-President are elected, the President shall appoint, subject to the approval of the Board, a Secretary and a Treasurer.

Sec. 4. In addition to the above officers there shall also be a manager, who shall be appointed by the President, subject to the approval of the Board of Trustees.

Sec. 11. The salaries of the President, Vice-President, Secretary, Treasurer, and **Manager, and** all subordinate agents shall be fixed by the President, subject to the approval of the Board of Trustees.

Sec. 13. There shall be selected from the Trustees an Executive Committee composed of three persons who shall be named by the President, subject to the approval of the Board of Trustees, whose duty it shall be, in the absence of regular meetings of the Board, to perform all the duties, and do all things that might be done by the full Board when in regular session, and the President of this Company shall be ex-officio Chairman of said Executive Committee.

Sec. 30. Dividends must be declared and paid to the stockholders [281] on the first day of Feb-



ruary of each year, after the stock has been taken, to the full amount of the net profits, provided the net profits do not exceed ten (10) per cent of the Capital Stock. In the event of an excess of the net profits over ten (10) per cent of the Capital Stock, the said Company, at the option of the Trustees, may declare a further dividend to the full amount of the net profits, to be paid at the option of said trustees at any and such times and in any and such amounts, with interest at the rate of seven (7) per cent per annum, within one (1) year from date of declaration.

Upon motion of John M. Keith, the Resolution of R. A. Eddy was adopted unanimously—all of the Trustees voting Aye.

There being no further business before the Board, the meeting adjourned.

EDWARD L. BONNER,  
President.

JOHN M. KEITH,  
Secretary.

Missoula, M. T., September 6, 1886.

Pursuant to notice published in the "Missoula County Times" newspaper, and in accordance with the By-laws, the annual meeting of the Stockholders of the Missoula Mercantile Company held this day at the office of the Company at twelve o'clock noon, there being present Andrew B. Hammond, R. A. Eddy, C. H. McLeod, J. M. Keith, T. G. Hatheway and G. T. Scully, Mrs. Florence Hammond by proxy, Mrs. Edwinna Eddy by proxy, and Edwinna C. Hammond, Florence Hammond, Richard E. Hammond, and Leonard C. Hammond

by their guardian Andrew B. Hammond.

In the absence of the President, the Vice-president called the meeting to order, when J. M. Keith was appointed Secretary. [282]

The Vice-president presented the Balabce Sheet in lieu of his annual report which was accepted and ordered filed.

The Vice-president then announced that the first business before the meeting was the election of six Trustees to manage the affairs of the Company until the next regular annual meeting or until their successors shall be elected and qualified: Whereupon the stockholders proceeded to cast their ballots for the six Trustees, and upon the ballots being counted the Tellers announced that the following persons had received a majority of the votes cast, and are duly elected Trustees of the Missoula Mercantile Company for the ensuing year, viz.:

E. L. Bonner.

J. M. Keith.

R. A. Eddy.

C. H. McLeod.

A. B. Hammond.

G. T. Scully.

There being no further business before the stockholders the meeting adjourned.

A. B. HAMMOND,

Vice-president.

JOHN M. KEITH,

Secretary.

Missoula, Mt., September 6th, 1886.

A meeting of the Trustees elected this day was held at the office of the Missoula Mercantile Company at 2:30 o'clock P. M. There being present A. B. Hammond, R. A. Eddy, C. H. McLeod, John M. Keith

and George T. Scully.

Upon motion Andrew B. Hammond took the chair, and [283] John M. Keith was elected Secretary of the Meeting.

The Chairman announced the first business before the meeting was the election of one President and one Vice-president. The Trustees thereupon proceeded to cast their ballots for President, and after the ballots had been counted, the tellers announced that Edward L. Bonner had been elected President. The Trustees then cast their ballots for Vice-president, and when said ballots had been counted, the tellers announced that Andrew B. Hammond had been duly elected Vice-president.

In the absence of the President, the Vice-president appointed the following-named persons an Executive Committee in accordance with By-law No. 13, viz.: A. B. Hammond, C. H. McLeod, and J. M. Keith, and upon motion of G. T. Scully, the Board of Trustees confirmed the appointment of said Executive Committee.

In the absence of the President, the Vice-president appointed Charles H. McLeod, Manager, John M. Keith, Secretary, and John M. Keith, Treasurer, and upon motion of R. A. Eddy, said appointments were confirmed by the Board of Trustees.

There being no further business before the meeting, it was adjourned.

A. B. HAMMOND,  
Vice-president.  
JOHN M. KEITH,  
Secretary.



Missoula, M. T., September 5th, 1887.

Pursuant to notice published in the "Missoulian" newspaper, and in accordance with the by-laws of the Company, the annual meeting of the stockholders of the Missoula Mercantile Company was held this day at 12 o'clock noon, there [284] being present Andrew B. Hammond, Richard A. Eddy, C. H. McLeod, John M. Keith, T. G. Hathaway, George T. Scully, Mrs. Florence Hammond by proxy, Mrs. Edwinna Eddy by proxy, Edwinna C. Hammond, Florence Hammond, Richard E. Hammond, and Leonard C. Hammond by their guardian, A. B. Hammond.

In the absence of the President, the meeting was called to order by the Vice-president and John M. Keith was elected Secretary of the meeting.

The Vice-president presented the Balance Sheet showing the Company's standing in lieu of the President's annual report, which was accepted and ordered filed.

The Vice-president then announced that the first business before the meeting was the election of six Trustees to manage the affairs of the Company until the next regular annual meeting of the stockholders, or until their successors shall be elected and qualified. Whereupon the stockholders proceeded to cast their ballots for the six Trustees, and upon the ballots being counted the Tellers announced that the following-named persons had received a majority of the votes cast and are duly elected Trustees of the Mis-



soula Mercantile Company for the ensuing year, viz.:

E. L. Bonner.	John M. Keith.
R. A. Eddy.	Charles H. McLeod.
A. B. Hammond.	Thomas G. Hathaway.

There being no further business before the stockholders' meeting it was adjourned.

A. B. HAMMOND,  
Vice-president.

JOHN M. KEITH,  
Secretary *pro tem*. [285]

Missoula, M. T., September 5, 1887.

A meeting of the Trustees of the Missoula Mercantile Company, elected at the Stockholders' meeting held this day, was held at the office of the Company at two o'clock P. M. There being present A. B. Hammond, R. A. Eddy, C. H. McLeod, John M. Keith and T. G. Hatheway.

Upon motion Andrew B. Hammond took the chair, and John M. Keith was elected Secretary of the meeting.

The Chairman announced the first business before the meeting was election of a President and a Vice-President of the Board of Trustees. Whereupon the Trustees proceed to cast their ballots, and after being counted, the Chairman announced that Edward L. Bonner had been elected President. The Trustees then cast their ballots for Vice-president, and after being counted, the Chairman announced that A. B. Hammond had received a majority of the votes cast.

In the absence of the President, the Vice-president

appointed the following-named persons as an Executive Committee in accordance with By-law No. 13, viz.: A. B. Hammond, C. H. McLeod, and John M. Keith, and upon motion of R. A. Eddy, the Board of Trustees approved of said appointments.

In the absence of the President, the Vice-president appointed C. H. McLeod Manager, John M. Keith, Secretary, and John M. Keith, Treasurer, and upon motion of T. G. Hatheway confirmed said appointments.

There being no further business before the meeting, it was adjourned.

A. B. HAMMOND,  
Vice-president,  
JOHN M. KEITH,  
Secretary. [286]

#### STOCKHOLDERS' MEETING.

Notice of meeting of stockholders of Missoula Mercantile Company. Notice is hereby given that there will be a meeting of the stockholders of the Missoula Mercantile Company at the office of said Company, in the town of Missoula, Missoula County, Montana, between the hours of 10:00 o'clock A. M. and 2:00 o'clock P. M., on the twenty-sixth day of January, 1888, for the purpose of voting on the proposition to increase the capital stock of said Company to three hundred thousand dollars.

This 19th day of December, 1887.

A. B. HAMMOND,  
JOHN M. KEITH,  
C. H. McLEOD,  
THOMAS G. HATHAWAY,  
R. A. EDDY,

Trustees.

Office of Missoula Mercantile Company.

Missoula, Montana, January 26th, 1888.

The stockholders of Missoula Mercantile Company met at the office of said company in the town of Missoula on this day pursuant to a notice published for six successive weeks prior to said meeting to wit, from the 21st day of December, 1887, to the 25th day of January, 1888, in the Missoula County "Times," a weekly newspaper published in the town and county of Missoula, and pursuant also to notices duly and [287] regularly mailed to the stockholders of this company postage prepaid thereon. The meeting was called to order and Charles H. McLeod was on motion chosen Chairman and John M. Keith Secretary. On a call it was ascertained that all the stockholders were represented. The absent stockholders being represented by written proxies which were duly filed with the Secretary.

The Chairman stated the object of the meeting as contained in the notices thereof to be to consider the proposition to increase the capital stock of the Company to the sum of three hundred thousand dollars being an increase of five hundred shares of the par value of one hundred dollars each. The Chairman further announced that the meeting would proceed

to vote on said proposition in the usual way by ballot. That each stockholder was entitled to one vote for each share of stock held or represented by him. That those in favor of the increase should vote the number of shares of stock held or represented by them "yes." That those opposed the number of shares of stock held or owned by "no." The Chairman then appointed A. B. Hammond and Thomas G. Hathaway, Tellers.

The vote being cast and canvassed the Chairman announced that each share of stock had been voted in favor of increasing the capital stock to the amount named in the notices and it was further ordered that the Chairman make a statement as required by law of the proceedings of the meeting. Capital stock paid in, liabilities of the company and amount to which the capital stock is increased and file same with the County Recorder of Missoula County. And it was ordered that the Trustees do and they are hereby authorized to open the books [288] of this Company for the purpose of receiving subscriptions for the five hundred additional shares of stock at the par value of one hundred dollars each.

There appearing no further business the meeting adjourned.

C. H. McLEOD,  
Chairman.

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Secretary.

The following is a statement made by the Chairman of the meeting of the stockholders, a copy of



which was filed with the County Recorder of Missoula County:

Office of Missoula Mercantile Company.

Missoula, Montana, January 26th, 1888.

At a meeting of the stockholders of Missoula Mercantile Company held pursuant to notices given and published as required by law and at which all the stockholders were represented. Convened and held for the purpose of considering the proposition to increase the capital stock of said Company to Three hundred thousand dollars.

Said proposition being submitted all the stock of the Company was voted in favor of the proposition.

The affairs of said Company are as follows:

Capital stock actually paid in.....	250,000.00
Liabilities of Company .....	15,000.00
Amount to which stock is increased.....	300,000.00

In witness whereof I have hereunto set my hand and seal this the 26th day of January, A. D. 1888.

Signed—CHARLES H. McLEOD,  
Chairman of Meeting of Stockholders.

Countersigned:

JOHN M. KEITH,

Secretary of Meeting of Stockholders. [289]

Which statement was verified and acknowledged as required by law.

Office of Missoula Mercantile Co.

Missoula, Montana,———, 1888.

A meeting of the trustees of Missoula Mercantile Company convened and held at the office of said Company in the town of Missoula pursuant to a call of

the Vice-president. Present, A. B. Hammond, Vice-president, presiding, John M. Keith, Secretary and Charles H. McLeod.

The President laid before the Board the proceedings of the stockholders at a meeting held on the 26th inst., and announced that in accord with the directions of said Stockholders' meeting, the books were opened for subscription for the additional five hundred shares of stock added to the Capital stock of this Company by direction of the stockholders. And that said stock could be taken at its par value of one hundred dollars per share.

Whereupon said additional shares of stock were subscribed for as follows:

Mrs. Edwinna M. Eddy.....	120	shares
Mrs. Carrie L. Bonner.....	160	"
Richard A. Eddy.....	110	"
Edward L. Bonner .....	70	"
I. S. G. Van Wart.....	20	"
Harry T. Van Wart.....	20	"

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Total,                      500      "

The President then announced that the whole number of additional shares of the stock had been subscribed for, and the Secretary was directed to issue certificates to said parties respectively for the number of shares of stock subscribed for as above. [290]

Missoula, Montana, September 3, 1888.

Pursuant to notice published in the "Missoulian" newspaper, and in accordance with the By-Laws of the Company, there was a meeting of the stockholders of the Missoula Mercantile Company, held this

day at 12 o'clock noon in the office of the Company at Missoula. There being present E. L. Bonner, A. B. Hammond, R. A. Eddy, J. M. Keith, C. H. McLeod, H. C. Keith, T. G. Hathaway, Mrs. Florence Hammond by proxy, Mrs. E. M. Eddy by proxy, Mrs. Carrie L. Bonner by proxy, Edwinna C. Hammond, Florence Hammond, Richard E. Hammond and Leonard C. Hammond by their guardian, A. B. Hammond.

Upon motion the chair was taken by E. L. Bonner, president of the company, and H. C. Keith was elected Secretary pro tem.

The President presented the balance sheet on the first day of September, 1889, in lieu of his annual report, which Balance Sheet showed fully the company's standing, and which after examination by the stockholders present, was accepted and ordered filed.

The President then announced the next order of business was the election of six Trustees to manage the affairs of the company until the next annual meeting of the stockholders, or until their successors shall be elected and qualified.

The President then appointed J. M. Keith and C. H. McLeod as Tellers, and the stockholders proceeded to cast their ballots; after all the votes had been cast and the Tellers counted the Ballots, the following report was read:

Missoula, Mt. Sept. 3, 1888.

To the stockholders of Miss. Mer. Co., [291]  
Missoula.

Gentm: We, the undersigned having been appointed tellers of an election for six trustees for the

Missoula Mercantile Company, respectfully report the vote cast as follows:

E. L. Bonner,	Received	2520	Votes
A. B. Hammond,	"	2520	"
R. A. Eddy,	"	2520	"
John M. Keith,	"	2520	"
C. H. McLeod,	"	2520	"
Thomas G. Hathaway,	"	2520	"

and would certify that the above six persons have been duly elected Trustees of the Missoula Mercantile Company.

Respectfully,

(Sd.) J. M. KEITH.

(Sd.) C. H. McLEOD.

After the above notice was read by the Secretary, the President announced that E. L. Bonner, A. B. Hammond, C. H. McLeod, R. A. Eddy, J. M. Keith and T. G. Hatheway were duly elected Trustees.

There being no further business before the meeting, it was adjourned.

A. B. HAMMOND, President.

H. C. KEITH, Secretary *pro tem*.

Missoula, Mont., September 3rd, 1888.

Pursuant to call of the President, there was a meeting of the Trustees elected this day, held at the office of the Missoula Mercantile Company in Missoula, at 3 o'clock P. M. There being present, E. L. Bonner, Presdt., A. B. Hammond, R. A. Eddy, J. M. Keith, and Chas. H. McLeod. [292]

The chair was occupied by E. L. Bonner, President of the Company, and J. M. Keith was elected Secretary of the meeting.



The chairman announced the first business before the Board of Trustees was the election of one President and one Vice-President. The Trustees then proceeded to cast their votes for President, and after the ballots had been counted, the chairman announced that Edward L. Bonner had received a majority of the votes cast for President. The Trustees then proceeded to cast their votes for Vice-President, which after being counted the chairman announced that Andrew B. Hammond had received a majority of the votes cast for Vice-President, and declared E. L. Bonner and A. B. Hammond duly elected President and Vice-President, respectively.

The President then announced that he had appointed as an Executive Committee in accordance with By-Law No. 13 A. B. Hammond, C. H. McLeod and J. M. Keith, which upon motion of R. A. Eddy was approved by the Board of Trustees.

The President then appointed Chas. H. McLeod, Manager, and H. C. Keith Secretary, and H. C. Keith Treasurer of the Company, which appointments were upon motion confirmed by the Board of Trustees.

The meeting then adjourned.

A. B. HAMMOND, President.

Secretary *pro tem*.

Missoula, Mont., September 2d, 1889.

Pursuant to notice published in the "Gazette" newspaper, and in accordance with the By-Laws of this Company, there was a meeting of the stockholders of the Missoula Mercantile Company, held at the office of said Company, this [293] day at 12 o'clock noon. There being present, E. L. Bonner, A.

B. Hammond, J. M. Keith, C. H. McLeod, H. C. Keith, T. G. Hatheway, Mrs. Florence Hammond by proxy, Mrs Carrie S. Bonner by proxy, Edwinna C. Hammond, Florence Hammond, Richard E. Hammond, and Leonard C. Hammond by their guardian A. B. Hammond.

Upon motion the chair was taken by E. L. Bonner, President of the Company, and H. C. Keith was appointed Secretary *pro tem*.

The President presented to the meeting the trial balance sheet made on the first day of September, 1889, which fully showed the standing of the Company on that date, and which after examination was approved by the stockholders present, and was ordered filed.

The President then announced the next business before the meeting was the election of six (6) Trustees to manage the affairs of the company until the next annual meeting, or until their successors shall have been elected and qualified.

The President appointed J. M. Keith and T. G. Hatheway as Tellers, and the Tellers proceeded to cast their ballots. After all the votes had been cast, and the tellers had counted the ballots, the following report was read:

Missoula, M. T., Sept. 2d, 1889.

To the Stockholders of Miss. Mer. Co., Missoula.

Gentm.: We, the undersigned, having been appointed Tellers of an election for Six Trustees of the Missoula Mercantile Company, held this day, respectfully report the vote cast as follows: [294]

E. L. Bonner	Received	1665	Votes.
A. B. Hammond	"	1665	"
R. A. Eddy	"	1665	"
C. H. McLeod	"	1665	"
J. M. Keith	"	1665	"
T. G. Hatheway	"	1665	"

and would certify that the above-named six persons have been duly elected Trustees of the Missoula Mercantile Company.

(Sd.) J. M. KEITH.

(Sd.) T. G. HATHEWAY.

After the reading of the above communication by the Secretary, the President announced that E. L. Bonner, A. B. Hammond, R. A. Eddy, J. M. Keith, C. H. McLeod, and T. G. Hatheway had been elected Trustees.

There being no further business before the meeting it was adjourned.

A. B. HAMMOND, Chairman.

H. C. KEITH, Secretary *pro tem*.

Missoula, Mont., Sept. 2nd, 1889.

Pursuant to call of the President there was a meeting of the Trustees elected this day, held at the office of the Missoula Mercantile Company, at 2:30 o'clock P. M. There being present E. L. Bonner, A. B. Hammond, J. M. Keith, C. H. McLeod, and T. G. Hatheway.

The chair was occupied by President E. L. Bonner and J. M. Keith was appointed Secretary of the meeting.

The Chairman then announced the first business before the meeting was the election from the Trus-



tees of a President and one Vice-President. The Trustees then proceeded to cast their ballots for President, and after all of the [295] votes had been cast and counted, the chairman announced that Andrew B. Hammond had received a majority of all the votes cast. The Trustees then proceeded to cast their ballots for one Vice-President, and after the votes had all been cast and the ballots counted, the Chairman announced that Charles H. McLeod had received a majority of all the votes cast for Vice-President, and announced that A. B. Hammond had been duly elected President, and Charles H. McLeod had been duly elected Vice-President of the Missoula Mercantile Company.

The President then announced that he had appointed as an Executive Committee A. B. Hammond, C. H. McLeod, and J. M. Keith, which appointment, upon motion of T. G. Hatheway, was confirmed by the Board of Trustees.

The President then announced that he had made the following appointments, viz.: C. H. McLeod, Manager; Alfred Merz, Secretary and H. C. Keith, Treasurer, which appointments, upon motion of J. M. Keith, were confirmed by the Board of Trustees.

There being no further business before the meeting it was adjourned subject to call of the President.

A. B. HAMMOND, President.

J. M. KEITH, Secretary *pro tem*.

Missoula, Montana, May 1st, 1890.

Pursuant to call of the President, there was a special meeting of the Trustees of the Company held this day at their office at 2 o'clock P. M. There being present, A. B. Hammond, C. H. McLeod, John



M. Keith, and Thos. G. Hatheway.

The chair was occupied by the President, A. B. Hammond and John M. Keith was appointed Secretary of the meeting. [296]

The President then announced that the first business before the meeting was on the resignation of Alfred Merz as Secretary of the Company, to take effect this day, which resignation was on motion of John M. Keith, duly accepted.

The President then announced that he had appointed Gust Moser as Secretary of the Company, to fill the vacancy caused by the resignation of Alfred Merz which appointment of motion of C. H. McLeod was confirmed by the Board of Trustees.

There being no further business before the meeting it was adjourned subject to call of the President.

A. B. HAMMOND, President.

J. M. KEITH, Secretary *pro tem*.

### NOTICE.

To the Stockholders of the Missoula Mercantile Co.

You are hereby notified that there will be a meeting of the stockholders of the Missoula Mercantile Company held at the office of the Company in the town of Missoula, on Monday, the 21st day of July, 1890, at which meeting will be submitted to the stockholders the proposition to increase the capital stock of said Company from \$300,000 to \$600,000. By order of the Board of Directors.

A. B. HAMMOND, President.

Attest: GUST MOSER, Sec'y.

Missoula, Mont., June 4, 1889.

Office of Missoula Mercantile Co.

Missoula, Montana, July 21st, 1890.

Stockholders of Missoula Mercantile Co. met [297] at the office of said Company, in the City of Missoula on this day, pursuant to a notice published for six successive weeks prior to said meeting, to wit, June 4th, 1890, to the 21st day of July, 1890, in the "Missoula Gazette," a daily newspaper published in the City and County of Missoula, and pursuant also to notices duly and regularly mailed to the stockholders of this Company postage prepaid thereon.

The meeting was called to order and Charles H. McLeod was on motion chosen Chairman and Gust. Moser, Secretary.

On a call it was ascertained that all the stockholders were represented. The absent stockholders being represented by written proxies, which were duly filed with the Secretary.

The following named persons who are holding stocks of said Missoula Mercantile Co., under contract, were also present in person: Thos. C. Marshall, Fred T. Sterling; Tylar B. Thompson; C. A. Barnes, J. M. Price; J. P. Menard; Wm. Mentrurn; Dan Ross, and Tyler Worden. The Chairman stated the object of the meeting as contained in the notices thereof, to be to consider the proposition to increase the capital stock of the Company to the sum of Six Hundred Thousand Dollars, being an increase of Three Thousand Shares of the par value of One Hundred Dollars each.

The Chairman further announced that the meeting would proceed to vote on said proposition in the usual way, by ballot. That each stockholder was entitled

to one vote for each share of stock held by him. That those in favor of the increase should vote the number of shares of stock held or represented by them "Yes." That those opposed, the number of shares of stock held or represented by them "No." [298] The Chairman then appointed John M. Keith and Harry T. Van Wart Tellers. The vote being cast and canvassed, the Chairman announced that each share of stock had been voted in favor of increasing the Capital Stock to the amount named in the notices. All the persons holding stock under contract, voting in favor of increasing the stock.

It was further ordered that the Chairman make a statement as required by law, of the proceedings of the meeting; Capital Stock paid in; Liabilities of the Company, and amount to which the Capital Stock is increased, and file same with the County Recorder of Missoula County.

The Chairman then announced that there was on hand and to the credit of Undivided Profits the sum of Three Hundred Thousand Dollars. It was then ordered by a unanimous vote of all the stockholders, and of the persons holding stock under contract, that a Dividend be declared to the full amount of said Undivided Profits, to wit, Three Hundred Thousand Dollars, and that the same be paid in stock of the Company, to wit, the additional Three Thousand shares to which the Capital Stock of the Company has been increased.

There being no further business the meeting adjourned.

CHARLES H. McLEOD, Chairman.

GUST. MOSER, Secretary.



The following is a statement made by the Chairman of the meeting of the stockholders, a copy of which was filed with the County Recorder of Missoula County:

Office of Missoula Mercantile Co.

Missoula, Montana, July 21st, 1890.

At a meeting of the stockholders of the Missoula Mercantile Co. held pursuant to notices given and published as required by law, and at which all the stockholders were represented, [299] convened and held for the purpose of considering the proposition to increase the Capital Stock to Six Hundred Thousand Dollars.

Said proposition being submitted, all of the stock of the Company was voted in favor of the proposition.

The Capital Stock of the Com-

pany actually paid in is. . . . . 300,000.00

The Amount of Liabilities of the

Co. . . . . 50,000.00

Capital Stock is increased to. . . . 600,000.00

In witness whereof, I have hereunto set my hand this the 21st day of July, A. D. 1890.

CHARLES H. McLEOD, Chairman.

Countersigned: GUST. MOSER, Secretary.

Which statement was verified and acknowledged as required by law.

Missoula, Montana, September 1st, 1890.

Pursuant to notice published in the "Gazette" newspaper and in accordance with the By-Laws of this Company, there was a meeting of the stockholders of the Missoula Mercantile Company held at the



office of said Company, this day at 12 o'clock noon; there being present, E. L. Bonner, C. H. McLeod, T. G. Hatheway, John M. Keith and Harry T. Van Wart, in person, and R. A. Eddy, A. B. Hammond, Mrs. E. M. Eddy; Mrs. F. Hammond, Edwinna Hammond, Florence Hammond, Richard Hammond, Leonard Hammond, Mrs. Carrie S. Bonner, Harry C. Keith, and Bessie A. Bonner by proxy.

On motion the Chair was taken by C. H. McLeod, [300] Vice-President of the Company, and John M. Keith was appointed Secretary of the meeting.

The Vice-President presented to the meeting the Trial Balance Sheet made on the 1st day of September, 1890, which fully showed the standing of the Company that date, and which after examination was approved by the stockholders present, and was ordered filed.

The Vice-President then announced the next business before the meeting was the election of Six (6) Trustees to manage the affairs of the Company, until the next annual meeting, or until their successors shall have been elected and qualified. The Vice-President appointed E. L. Bonner and Harry T. Van Wart as Tellers and the Tellers proceeded to cast their ballots, after all the votes had been cast, and the Tellers had counted the ballots the following report was read:

Missoula, Monta., Sep. 1, 1890.

To the Stockholders of the Missoula Merc. Co.

Gents: We, the undersigned, having been appointed Tellers of an election for Six Trustees of the Missoula Mercantile Company held this day, respectfully report the vote cast as follows:

E. L. Bonner	Received	3000	Votes.
A. B. Hammond	"	3000	"
R. A. Eddy	"	3000	"
J. M. Keith	"	3000	"
C. H. McLeod	"	3000	"
T. H. Hatheway	"	3000	"

and would certify that the above-named six persons have been duly elected Trustees of the Missoula Mercantile Company.

(Sgd.) E. L. BONNER.

HARRY T. VAN WART. [301]

After the reading of the above communication by the Secretary, the Vice-president announced that E. L. Bonner, A. B. Hammond, R. A. Eddy, C. H. McLeod, J. M. Keith, and T. G. Hatheway, had been elected Trustees.

There being no further business before the meeting, it was adjourned.

C. H. McLEOD,

Chairman.

J. M. KEITH,

Secretary *pro tem*.

Missoula, Montana, September 5th, 1890.

Pursuant to call of the President, there was a meeting of the Trustees elected September 1st, 1890, held at the office of Missoula Mercantile Co., at 2 o'clock P. M. There being present A. B. Hammond, E. L. Bonner, C. H. McLeod and John M. Keith.

The chair was occupied by the President, A. B. Hammond, and John M. Keith was appointed Secretary of the meeting.

The chairman then announced the first business

before the meeting was the election from the Trustees of a President and one Vice-president. The Trustees then proceeded to cast their ballot for President, and after all the votes had been cast and counted, the chairman announced that Andrew B. Hammond had received a majority of the votes cast. The Trustees then proceeded to cast their ballot for one Vice-president, and after the votes had all been cast and counted, the Chairman announced that Charles H. McLeod had received a majority of all the votes cast for Vice-president, and announced that A. B. Hammond had been duly elected President and Charles H. McLeod had been duly elected Vice-president of the Missoula Mercantile Company.

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The President then announced that he had appointed as an Executive Committee A. B. Hammond, C. H. McLeod and John M. Keith which appointment on motion of E. L. Bonner was confirmed by the Board of Trustees.

The President then announced that he had made the following appointments, viz.: C. H. McLeod, Manager; Gust Moser, Secretary, and Harry C. Keith, Treasurer, which appointments upon motion of J. M. Keith were confirmed by the Board of Trustees.

There being no further business before the meeting it was adjourned subject to call of the President.

A. B. HAMMOND,

President.

J. M. KEITH,

Secretary *pro tem.*

Missoula, Montana, September 9th, 1890.

Pursuant to an order made by the stockholders of the Missoula Mercantile Co. on July 21st, 1890, declaring a Dividend of Three Hundred Thousand Dollars, payable in stock of the Company, there was this day issued to the stockholders as they appear on the books of the Company Three Thousand shares of the par value of One Hundred each as follows:

C. H. McLeod.....	840	shares
T. G. Hatheway.....	100	“
John M. Keith.....	102	“
Mrs Florence Hammond.....	300	“
Edwinna Hammond .....	50	“
Florence Hammond .....	50	“
Richard Hammond .....	50	“
Leonard Hammond .....	50	“
Harry T. Van Wart .....	20	”
Harry C. Keith.....	20	“

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R. A. Eddy.....	265	“
A. B. Hammond.....	510	“
E. L. Bonner.....	34	“
Mrs. E. M. Eddy.....	223	“
Bessie A. Bonner.....	133	”
Mrs. Carrie S. Bonner.....	253	”

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Total, 3000 “

GUST MOSER,

Secretary.

Missoula, Montana, September 7th, 1891.

Pursuant to notice published in the Gazette newspaper and in accordance with the By-Laws of this



Company, There was a meeting of the stockholders of the Missoula Mercantile Company held at the office of said Company, this day at 12 o'clock noon; there being present E. L. Bonner, A. B. Hammond, C. H. McLeod, John M. Keith, Thomas G. Hatheway and Harry T. Van Wart in Person, and R. A. Eddy, Edwinna M. Eddy, Mrs. F. A. Hammond, Edwinna Hammond, Florence Hammond, Richard Hammond, Leonard Hammond, Mrs. C. S. Bonner, Harry C. Keith and Bessie Bonner, by proxy.

On motion the chair was taken by A. B. Hammond, President of the Company, and John M. Keith was appointed Secretary of the meeting.

The President presented to the meeting the Trial Balance sheet made on the 1st day of September, 1891, which fully showed the Standing of the Company that date, and which after examination was approved by the stockholders present, and was ordered filed.

The President then announced the next business before the meeting was the election of six (6) trustees to manage the affairs of the Company until the next annual meeting or until [304] their successors, shall have been elected and qualified.

The President appointed Thomas G. Hatheway and Harry T. Van Wart as Tellers, and the stockholders then proceeded to cast their ballots. After all the votes had been cast and the Tellers had counted the ballots, the following report was read.

Missoula, Montana, September 7, 1891.

To the Stockholders of Missoula Merc. Co.

Gents: We the undersigned having been appointed

Tellers, of an election for Six (6) Trustees of the Missoula Mercantile Co., held this day respectfully report the vote cast as follows:

E. L. Bonner,	Received	6000	Votes.
A. B. Hammond,	"	6000	"
R. A. Eddy,	"	6000	"
C. H. McLeod,	"	6000	"
Thomas G. Hatheway,	"	6000	"
John M. Keith,	"	6000	"

and would certify that the above named six persons have been duly elected Trustees of the Missoula Mercantile Co., for the ensuing year.

(Signed) THOMAS G. HATHEWAY,  
HARRY T. VAN WART.

After the reading of the above communication by the Secretary, the President announced, that E. L. Bonner, A. B. Hammond, R. A. Eddy, C. H. McLeod, Thomas G. Hatheway and John M. Keith had been elected Trustees for the ensuing year.

There being no further business before the meeting  
[305] it was adjourned.

A. B. HAMMOND, Chairman.

\_\_\_\_\_, Secretary.

Missoula, Mont. September 10th, 1891.

Pursuant to call of the President, there was a meeting of the Trustees elected September 7th, 1891, held at the office of the Missoula Mercantile Co., at 2 o'clock P. M. there being present A. B. Hammond, E. L. Bonner, C. H. McLeod, Thomas G. Hatheway, and John M. Keith.

The chair was occupied by the President A. B.

Hammond, and John M. Keith was appointed Secretary of the meeting.

The chairman then announced the first business before the meeting was the election from the Trustees of a President and one Vice-president.

The Trustees then proceeded to cast their ballot for President, and after all the votes had been cast, and counted, the chairman announced that Andrew B. Hammond had received a majority of the votes cast.

The Trustees then proceeded to cast their ballot for one Vice-president, and after the votes had all been cast and counted, the chairman announced that Charles H. McLeod, had received a majority of all the votes cast for Vice-president, and announced that Andrew B. Hammond had been duly elected President, and Charles H. McLeod, Vice-president of the Missoula Mercantile Company for the ensuing year.

The President then announced that he had appointed as an executive committee, Charles H. McLeod, John M. Keith, and [306] Thomas G. Hatheway, which appointment on motion of E. L. Bonner, was duly confirmed by the Board of Trustees.

The President then announced the following appointments, viz.: Charles H. McLeod, Manager, Gust. Moser, Secretary, and Harry C. Keith, Treasurer, which appointments were on motion of John M. Keith duly confirmed by the Board of Trustees.

There being no further business before the meeting it was adjourned subject to call of the President.

A. B. HAMMOND, President.

\_\_\_\_\_, Secretary.

NOTICE OF STOCKHOLDERS' MEETING.

To the Stockholders of the Missoula Mercantile Company:

You are hereby notified that there will be a meeting of the stockholders of the Missoula Mercantile Company, held at the office of the Company at the city of Missoula, on the 24th day of October, 1891, at which meeting will be submitted to the stockholders a proposition to increase the capital stock of said Company to the sum of One million two hundred thousand dollars.

Respectfully,

A. B. HAMMOND,  
RICHARD A. EDDY,  
CHAS. H. McLEOD,  
THOMAS G. HATHEWAY,  
JOHN M. KEITH,

Trustees.

Dated Missoula, Mont. Sept. 1, 1891.

Missoula, Mont. Oct. 24th, 1891.

A meeting of the stockholders of the Missoula Mercantile Company, assembled pursuant to a notice published in [307] the "Missoula Gazette," and signed by A. B. Hammond, Richard A. Eddy, Charles H. McLeod, Thomas G. Hatheway and John M. Keith, being a majority of all the Trustees of said Company, and dated Sept. 1st, 1891, calling together the stockholders of said Company to meet on this day, to consider a proposition to increase the Capital Stock from Six Hundred Thousand to One Million Two Hundred Thousand Dollars, a copy of said notice is attached to this page as a part of the



minutes of the proceedings of this meeting, A. B. Hammond, President, was present, called the meeting to order, read the notice, stated the objects as above, and directed the Secretary to call the roll of stockholders, which being done, it was ascertained, that the following stockholders were present in person, or duly represented by written proxy, which were exhibited, approved and directed to be filed with the Secretary, to wit:

R. A. Eddy, 530 shares; by A. B. Hammond, Attorney in Fact, Proxy.

Edwinna M. Eddy, 446 shares by A. B. Hammond, Attorney in Fact, Proxy.

A. B. Hammond, 1020 shares in person.

E. L. Bonner, 68 shares, in person.

C. H. McLeod, 1680 shares, in person.

T. G. Hatheway, 200 shares, in person.

John M. Keith, 204 shares, in person.

Mrs. F. A. Hammond, 600 shares, in person.

Edwinna Hammond, 100 shares, by A. B. Hammond, her Guardian.

Florence Hammond, 100 shares, by A. B. Hammond, her Guardian.

Richard Hammond, 100 shares, by A. B. Hammond, his Guardian.

Leonard Hammond, 100 shares, by A. B. Hammond, his Guardian. [308]

Mrs. C. S. Bonner, 506 shares in person.

Harry T. Van Wart, 40 shares in person.

Harry C. Keith, 40 shares in person.

Bessie Bonner, 266 shares by E. L. Bonner, her Guardian.

The President announced that all the stock of the Missoula Mercantile Co. being present or represented by proper accredited Proxy, the business before the meeting would next be, the consideration of the proposition for which the meeting was called, to wit: The increase of its Capital stock. Whereupon Mr. John M. Keith offered the following Preamble and Resolutions and moved their adoption namely:

Whereas, it is apparent that the business of the Missoula Mercantile Company has so increased and the volume thereof is of such magnitude as makes it absolutely necessary to increase its Capital stock, and

Whereas, to the end that the additional increased shares of stock may be speedily subscribed and paid for, so as not to cause any embarrassment or delay in raising the increase of funds necessary to carry on and profitably conduct the business of the said Company it is deemed advisable to divide the Capital stock of the said Company into three (3) classes, therefore:

Be it Resolved, that the Capital stock of the said Missoula Mercantile Company be and the same is hereby increased from the sum of Six Hundred Thousand (\$600,000.00) Dollars, to the sum of Twelve Hundred Thousand (\$1,200,000.00) Dollars, and

Be it further Resolved: that the said Capital stock be divided into twelve thousand (12000) shares of the par value of One hundred (\$100.00) Dollars, each, and

Be it further Resolved that the said shares of stock [309] be divided into three (3) distinct classes denominated as follows, to wit:

First Class to consist of Three Thousand shares, and called and designated "First Preferred stocks" on which an annual dividend of eight (8) per cent on the par value thereof shall be first paid out of the net profits or earnings of the business of the said Missoula Mercantile Company, to the holders thereof, which sum when so paid to the holders thereof, shall be in lieu of all further participation in any of the profits or earnings of the said Company up to the time of that settlement.

And the second class to consist of Three Thousand Seven hundred and Twelve shares, and called and designated "Second Preferred stock" on which an annual dividend of twelve (12%) per cent on the par value thereof, shall be, next thereafter, paid out of the net profits or earnings of said Company, to the holders thereof, should there be a sufficiency thereof, for that purpose, after paying the annual dividend on the "First Preferred stock" as aforesaid; which sum when so paid to the holders thereof, shall be in lieu of all further participation in any of the profits or earnings of the said Company up to the time of that settlement.

And the third class to consist of Fifty-Two Hundred and Eighty Eight shares, and called and designated "Common stock," to which class shall belong all the profits and earnings of said company, after the payment of the annual dividends on the said "First Preferred stock" and of the said "Second



Preferred stock," as hereinbefore provided, and

Be it further Resolved: That in the event of [310] dissolution, disincorporation or liquidation of the said Missoula Mercantile Company, the said several classes of stock aforesaid shall be redeemed in the following order and manner, to wit:

The par value of the said "First Preferred stock," together with a dividend of eight (8%) per cent per annum thereon shall be first paid in money out of whatsoever assets there may be belonging to the said company.

And the said "Second Preferred stock" shall be next thereafter redeemed and its par value, together with a dividend at the rate of twelve (12%) per cent per annum thereon shall be paid in money out of the assets of the said company, should there be a sufficiency thereof for the purpose after the redemption of the said "First Preferred stock" together with eight (8%) per cent dividend on the par value thereof as aforesaid, if not, then payment shall be made to the extent of whatever assets there may be remaining, and the same shall be paid *pro rata* among the holders of said "Second Preferred stock," and accepted by them in full redemption of said stock and if the assets of said Company are more than sufficient to redeem said "First Preferred stock" at its par value together with eight per cent dividend thereon as aforesaid, and said "Second Preferred stock" at its par value together with twelve (12%) per cent dividend thereon as aforesaid, the surplus or whatever remains of the assets of said company after the redemption of said "First



Preferred stock" and said "Second Preferred stock," as aforesaid shall be distributed *pro rata* among the holders of said "Common stock" and accepted by them in full redemption of said stock.

On the passage of the foregoing preamble and resolutions the chair ordered the roll called and the vote resulted [311] as follows:

R. A. Eddy, 530 shares by A. B. Hammond, Proxy.

E. M. Eddy, 446 shares by A. B. Hammond, Proxy.

A. B. Hammond, 1020 shares.

E. L. Bonner, 68 shares.

C. H. McLeod, 1680 shares.

T. G. Hatheway, 200 shares.

John M. Keith, 204 shares.

Mrs. F. A. Hammond, 600 shares.

Edwinna Hammond, 100 shares by A. B. Hammond,  
Guardian.

Florence Hammond, 100 shares by A. B. Hammond,  
Guardian.

Richard Hammond, 100 shares by A. B. Hammond,  
Guardian.

Leonard Hammond, 100 shares by A. B. Hammond,  
Guardian.

Mrs. C. S. Bonner, 506 shares.

Harry T. Van Wart, 40 shares.

Harry C. Keith, 40 shares.

Bessie Bonner, 266 shares by E. L. Bonner, Guard-  
ian.

The entire stock of the Missoula Mercantile Company voting in the affirmative, the president announced that the Resolutions had passed unanimously, and the increase of stock was therefore ac-

cordingly authorized.

The President then announced that further in confirmation of the increase as specified in the call for this meeting, he had had prepared an Agreement, authorizing the [312] increase of the Capital stock of said Company and the division of the Capital stock as increased into the three classes, namely, "First Preferred," as conditioned in the Resolutions just passed, and "Second Preferred" as conditioned in the Resolutions just passed, and "Common" as conditioned in said Resolutions regularly and duly signed by the holders of the entire present issue of the Capital stock of the "Missoula Mercantile Company" and now presents the same to this meeting and recommends that the same be recorded as a part of these proceedings.

This Agreement made and entered into this the 24th day of October, A. D. 1891, by and between the undersigned stockholders of the "Missoula Mercantile Company," a corporation organized, existing and doing business under the Laws of Montana, witnesseth:

That we and each of us being owners of stock in the "Missoula Mercantile Company" and collectively being the owners of all and the entire stock of said Company, do severally covenant, promise and agree, each with the other, that the Capital stock of said Company, now Six Hundred Thousand (\$600,000.00) Dollars shall be increased to the sum of Twelve Hundred Thousand (\$1,200,000.00) Dollars and that the said Capital stock when so in-

creased, may be divided into three (3) classes, as follows, to wit:

First Class to be called and designated "First Preferred Stock."

Second Class to be called and designated "Second Preferred stock" and

Third Class, to be called and designated "Common stock."

And we further mutually covenant, promise and agree [313] that there shall be first paid out of the net profits or earnings of the business of said company, on the "First Preferred stock," an annual eight (8%) per cent on the par value of said stock, to the holders thereof, which sum when so paid shall be in lieu of all further participation in any of the profits or earnings of said company up to that settlement.

We further mutually covenant, promise and agree that there shall be paid out of the net profits or earnings of the business of the said Company, on the "Second Preferred stock" an annual dividend of twelve (12%) per cent on the par value of the said stock, to the respective holders thereof, Provided: There shall remain a sufficient amount of net profits or earnings after the payment of the annual dividend of eight (8%) per cent on the par value of the said "First Preferred stock," and there shall not remain a sufficient amount, then whatever sum shall be remaining, shall be divided among the holders of said "Second Preferred stock" *pro rata*, and said twelve (12%) per cent when so paid shall be in lieu of all further participations of said "Second Preferred



stock" in any of the profits or earnings of said Company up to that settlement.

And we further mutually covenant, promise and agree that whatever sum or sums shall remain of the net profits or earnings of said Company, after the payment of the annual dividend of eight (8%) per cent on the par value of the said "First Preferred stock," and after the payment of the annual dividend of twelve (12%) per cent on the par value of the said "Second Preferred stock," shall be and remain for distribution among the holders of the "Common Stock" *pro rata*; [314] and in the distribution of the same, the said "First Preferred stock," shall not, nor shall the said "Second Preferred stock," in any manner participate.

And we further mutually covenant, promise and agree that in any settlement or winding up of the affairs of the said Company, said "First Preferred stock," shall be first redeemed, and its par value, together with a dividend at the rate of eight (8%) per cent per annum thereon shall be first paid in money out of whatever assets there may be belonging to said Company.

And the said "Second Preferred stock" shall be next thereafter redeemed and its par value together with a dividend at the rate of twelve (12%) per cent per annum thereon shall be paid in money out of the assets of said Company; should there be a sufficiency thereof for that purpose, and if not, payment shall be made to the extent of whatever assets there may be after the redemption of the said "First Preferred stock" as aforesaid, but the payment shall



be made *pro rata* among the holders of the "Second Preferred stock" and accepted by them in full redemption of said stock.

And if the assets of the said Company are more than sufficient to redeem said "First Preferred stock" and said "Second Preferred stock" as aforesaid; the surplus, or whatever remains of the assets of the said Company after the redemption of the said "First Preferred stock" and the said "Second Preferred stock" as aforesaid shall be distributed *pro rata* among the holders of the said "Common Stock" and be accepted by them in full redemption of said stock.

And we further mutually covenant, promise, and agree that in selecting the Trustees of the said Missoula Mercantile Company annually, the holders of the said "First Preferred stock" [315] shall elect or select two (2) of the said Trustees; and that the holders of the said "Second Preferred stock" shall elect or select two (2) of the said Trustees; and that the holders of the Common stock of said Company shall elect or select three (3) of the said Trustees; making seven (7) the total number of Trustees.

And it is further expressly covenanted, promised, and agreed by and between the parties hereto, that the said Missoula Mercantile Co. shall at all times, pay all taxes, assessments, levies, or charges for State, County or municipal purposes out of the funds of said Co. whether the same be assessed, levied, or charged against the corporate property of said Co. or the individual stock, it being the express purpose herein to secure to the holders of the first preferred

stock a net dividend of eight per cent per annum, and to the holders of the second preferred stock a net dividend of twelve per cent per annum as hereinabove provided, free from all costs, charges, levies, assessments or taxes for State, County or Municipal purposes.

In Witness Whereof we have hereunto set our hands and seals, this the day and year first above written.

A. B. HAMMOND.

E. L. BONNER.

HARRY C. KEITH.

CARRIE S. BONNER.

C. H. McLEOD.

J. M. KEITH.

R. A. EDDY,

By A. B. HAMMOND, Attorney in Fact.

EDWINNA M. EDDY,

By A. B. HAMMOND, Attorney in Fact.

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EDWINNA C. HAMMOND,

By A. B. HAMMOND, Guardian.

FLORENCE HAMMOND,

By A. B. HAMMOND, Guardian.

RICHARD E. HAMMOND,

By A. B. HAMMOND, Guardian.

LEONARD C. HAMMOND,

By A. B. HAMMOND, Guardian.

BESSIE A. BONNER,

By E. L. BONNER, Guardian.

FLORENCE HAMMOND.

THOMAS G. HATHEWAY.

HARRY T. VAN WART.

Witness:

GUST. MOSER.

JOHN H. INCH.

JNO. G. TAYLOR.

W. S. SETTLE.

The President here exhibited Fifty Certificates of "First Preferred stock" contained in a bond book with appropriate stub numbered consecutively from 1 to 50, and

Also one hundred certificates of "Second Preferred stock" contained in a bound book with appropriate stub numbered consecutively from 1 to 100 and

Also one hundred and fifty Certificates of "Common stock" contained in a bound book with appropriate stub numbered consecutively from 1 to 150 and stated that in anticipation of the action of this meeting, he had had the same prepared and now submitted them for the approval of the stockholders, said certificates being examined and found to be in form respectively, as provided in the Resolutions just passed increasing the Capital stock of this Company and dividing the same into three classes, are now on motion accordingly approved and declared to be the form adopted as the certificates of the Capital stock of this Company respectively of the classes as [317] provided.

The following Resolution was then offered by Chas. H. McLeod, who moved that the same be adopted.

Whereas, at a meeting of all the stockholders of the Missoula Mercantile Company, held at the office of

the said Company, in the City of Missoula, and the state of Montana, on the 24th day of October, A. D. 1891, a proposition to increase the capital stock of said Company from Six Hundred Thousand (\$600,000.00) Dollars to Twelve Hundred Thousand (\$1,200,000.00) Dollars, was unanimously carried by the vote of all of the said stockholders, and

Whereas, at the said stockholders' meeting, it was also agreed by a unanimous vote by all the stockholders of said Company, that the Capital stock of the said Company so increased, should be divided into three (3) distinct classes and denominations, to wit:

“First Preferred stock,” on which should be first paid out of the net profits or earnings of the said Company, an annual dividend of eight (8%) per cent on its par value.

And, Second Preferred stock on which should be next thereafter paid out of the net profits or earnings of the said Company an annual dividend of twelve (12%) per cent on the par value, should there be a sufficiency thereof for that purpose, after paying the annual dividend on the said “First Preferred stock.”

And, Common Stock to which should belong the exclusive right to participate in the remainder of the net profits or earnings of the said Company, after the payment of the Dividends, provided for the said “First Preferred stock” and said Second Preferred stock, as aforesaid, and [318]

Whereas, at said meeting it was resolved unanimously by the vote of the said stockholders, that each



of the holders of present stock in the Missoula Mercantile Company, should have the option to subscribe for as many shares of the said First Preferred stock or said Second Preferred stock as the number of shares they respectively now hold of the present stock of the said Company is in proportion to said stocks.

Therefore, be it resolved:

That it is the sense of this meeting that the present issue of stock of the Missoula Mercantile Company be redeemed and retired and to that end it is further

Resolved, That the Three Thousand shares of the First Preferred stock as subscribed may be paid for with the present stock of this Company share for share.

And that the three thousand and seven hundred and twelve shares of the Second Preferred stock and the Three Thousand and Seven Hundred and Twelve shares of the common stock of said Company, is hereby appropriated and set apart for the redemption of the remaining Three Thousand shares of the present issue of the stock of the Missoula Mercantile Company, and the Trustees of this Company are hereby authorized and directed to apply said stock *pro rata* to such redemption, and to issue to the holders of said stock certificates of their due proportion of the said stock herein appropriated on surrender of certificates now held by them respectively.

And that the remaining shares of the common stock, to wit: One Thousand Five Hundred and Seventy-six shares be and remain in the Treasury of

this Company for further sale or subscription or to such other disposition as a  $\frac{2}{3}$  majority of the whole board of Trustees shall elect, at not less in [319] any event than its par value and subject to the action of the Board of Trustees of this Company, which said resolution *were* unanimously carried.

It having been suggested that those of the stockholders of the Missoula Mercantile Co., who would become holders of the First Preferred stock had received equivalent to interest on the same since Jan. 17th, 1891, to this date, and that the holders of the Second Preferred stock had not received any part of said interest, the following Preamble and Resolution was offered for the purpose of equalizing the stock in this regard.

Whereas, to the stockholders of the Missoula Mercantile Company, it appears that the subscribers to the First Preferred Stock of this Company have, by virtue of certain contracts and arrangements heretofore made and carried out, received interest on the various amounts of the old issue of the stock of this Company so held by them at the rate of eight per cent per annum from the 17th day of January, 1891, to this day.

And whereas, it further appears that the holders of the Second Preferred stock have not been so treated.

Now, therefore, for the purpose of equalizing the stockholders of the First and Second Preferred stock in this regard, the Trustees of this Company are hereby authorized, directed and required to provide for the payment to, and pay to the holders of the

Second Preferred Stock of this Company, interest on the par value of said stock at the rate of twelve per cent per annum from the 17th day of January, 1891, till the 24th day of October, 1891, which said Resolutions [320] were unanimously adopted.

The President here announced that in consideration of the interest taken and the faithful service rendered by a number of the employees of the Company, that he together with Mr. McLeod, Manager of the Company had concluded it to be to the best interest of the Company to more closely identify the employees, and with that view addressed a letter to a number of them as follows: Tom Bassler, T. T. McLeod, H. T. Van Wart, H. C. Keith, G. W. Dougherty, Gust. Moser, C. A. Barnes, Travis Hosey, W. S. Settle, F. W. Jones, C. F. Dorman, and T. J. D. Jenkins; dated the 26th day of January, 1891, in which it was stated that they would be permitted to become holders of a part of the stock of the Company on the usual terms accorded employees, and suggested that it would be proper that if the stockholders present concurred in this view that the Trustees be authorized by proper action of this meeting to carry out the suggestion in the letter referred to by transferring such employees of the Company, such number of the shares of the Company as in their Judgment would secure the end desired and promote the best interests of the Company.

Whereupon the following Resolution was offered and unanimously carried.

Whereas, it is deemed advisable and to the best interests of this Company, to interest many of the



employees and those having in charge the management and conduct of the business and affairs of this Company, as much as possible in the success, prosperity, well being and good standing of the Company, and that the same may not be so well done in any other way as by providing a means whereby they may become owners of more or less of the stock and as such holders of stock so become interested.

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It is therefore resolved that the trustees of this Co. be and they are hereby authorized to sell, contract for sale or agree to sell, transfer and deliver upon such terms and conditions as to them may seem meet and proper, such share or shares of stock heretofore designated as common stock and not heretofore sold or subscribed for, as in their Judgment may be to the best interests of this Company, and as will promote the end desired and that the trustees will take from said parties proper acquaintances.

There being no further business, the meeting adjourned *sine die*.

A. B. HAMMOND,  
President.

GUST. MOSER,  
Secretary.

Missoula, Monta., Oct. 25, 1891.

At a meeting of the Trustees of Missoula Mercantile Co., held at the office of said Company, on this day, to carry out the wishes of the stockholders of said Company, as expressed and passed at the meeting held on Oct. 24th, 1891, there being present, A. B. Hammond, E. L. Bonner, C. H. McLeod, T. G.



Hatheway and John M. Keith. C. H. McLeod occupying the chair, and John M. Keith acting as Secretary.

It was ordered, That the Secretary of said Company, issue Common Stock, to the employees named hereafter, to carry out the spirit of letter dated January 26th, 1891, and as per Agreement made and executed by said employees, to accept said stocks as full, complete and perfect performance of each and every promise contained in said letter, and said employees by said agreement expressly waived and all promises, [322] conditions, or rights as contained in said letter. The Secretary being ordered to issue Common Stock to the following named employees:

Tom Bassler.....	25	Shares
T. T. McLeod.....	10	"
Harry T. Van Wart... ..	20	"
Harry C. Keith.....	20	"
Geo. W. Dougherty.....	20	"
Gust. Moser... ..	40	"
C. A. Barnes.....	25	"
T. Hosey... ..	10	"
W. S. Settle.....	25	"
F. W. Jones.....	20	"
C. F. Dorman.....	10	"
T. J. D. Jenkins... ..	10	"

The stockholders having passed a Resolution authorizing the Trustees to provide for the payment of Interest due the holders of First and Second Preferred stock.

It was ordered that the Treasurer pay the holders

of said First and Second Preferred stocks, the interest due them on their respective stocks up to and including Oct. 24, 1891.

There being no further business the board adjourned.

C. H. McLEOD,  
Chairman.

J. M. KEITH,  
Secretary.

Missoula, Mont., Sept. 5th, 1892.

Pursuant to notice published in the "Missoulian," a newspaper published in the City of Missoula, Montana, and pursuant and in accordance with the By-Laws of this Company, there was a meeting of the stockholders of the Missoula Mercantile Co., held at the office of said Company this day at [323] 12 o'clock Noon, there being present all the stockholders of said Company, of each class, either in person or by proxy duly filed with the Secretary.

On motion the chair was taken by C. H. McLeod, Vice-president, of said company and Gust. Moser acting as Secretary of said meeting.

The President presented to the meeting the Trial Balance sheet made on the 1st day of September, 1892, which fully showed the standing of the Company that date, and which after examination was approved by the stockholders present, and was ordered filed.

The President then announced the next business before the meeting was the election of seven (7) Trustees, two of holders of First Preferred stock,

two of holders of Second Preferred stock, and Three of holders of common stock, to manage the affairs of the Company until the next annual meeting, or until their successors, shall have been elected and qualified.

The President appointed Thomas G. Hatheway, and Harry T. Van Wart as tellers, and the stockholders then proceeded to cast their ballots. After all the votes had been cast, and the Tellers had counted the ballots, the following report was read: Missoula, Mont., Sept. 6, 1892. To the Stockholders of Missoula Mercantile Company,

Gentlemen: We, the undersigned having been appointed Tellers, at an election for Seven (7) Trustees, of the Missoula Mercantile Co., held this day respectfully report the vote cast as follows—for Trustees of First Class, or [324] those holding First Preferred Stock.

E. L. Bonner	received	10,586	Shares
R. A. Eddy	“	10,586	“

For Trustees of Second Class or those holding Second Preferred Stock.

A. B. Hammond	received	10,586	Shares
C. H. McLeod	“	10,586	“

For Trustees of Third Class, or those holding Common Stock.

F. T. Sterling	received	10,586	Shares
John M. Keith	“	10,586	“
Tyler B. Thompson	“	10,586	“

and would certify that the above named seven persons, have been duly elected Trustees of the Missoula

Mercantile Co., for the ensuing year.

(Signed) T. G. HATHAWAY.

HARRY T. VAN WART.

After the reading of the above communication by the Secretary, the President announced that E. L. Bonner, R. A. Eddy, A. B. Hammond, C. H. McLeod, F. T. Sterling, John M. Keith, and T. B. Thompson had been elected Trustees for the ensuing year.

There being no further business before the meeting, it was adjourned.

C. H. McLEOD,  
Chairman.

GUST. MOSER,  
Secretary.

Missoula, Mont., September 9th, 1892.

Pursuant to call of the President, there was a meeting of the Trustees elected September 6th, 1892, held [325] at the office of the Missoula Mercantile Co., at 2 o'clock P. M., there being present A. B. Hammond, C. H. McLeod, John M. Keith, Fred T. Sterling, and Tylar B. Thompson.

The chair was occupied by the President A. B. Hammond and Fred T. Sterling was appointed Secretary of the meeting.

The chairman then announced the first business before the meeting was the election from the Trustees of a President and one Vice-President.

The Trustees then proceeded to cast their ballot for President, and after all the votes had been cast, and counted, the Chairman announced that Andrew B. Hammond had received a majority of the votes



cast, and C. H. McLeod had received a majority of all votes cast as Vice-President, and declared A. B. Hammond elected as President, and C. H. McLeod as Vice-President. The President then announced that he had appointed John M. Keith, Fred T. Sterling, and C. H. McLeod as Executive Officers, Gust. Moser as Secretary, and Harry T. Van Wart for Treasurer the ensuing year, which appointments were confirmed.

There being no further business, the board adjourned.

Missoula, Montana, Sept. 4th, 1893.

Pursuant to a notice published in the "Missoulian," a newspaper published in the City of Missoula, Montana, and pursuant, and in accordance with the By-Laws of this Company, there was a meeting of the stockholders of the Missoula Mercantile Co.; held at the office of said Company this day at 12 o'clock noon, there being present all the stockholders of said Company and of each class, either in person or by proxy duly filed with the Secretary.

On motion the chair was taken by C. H. McLeod, [326] Vice-President of said Company, and Gust. Moser acting as Secretary of said meeting.

The President presented to the meeting the trial balance sheet made on the first day of September, 1893, which fully showed the standing of the Company that date, and which after examination was approved by the stockholders present, and was ordered filed.

The President then announced the next business before the meeting was the election of Seven (7)

Trustees, Two of holders of first Preferred Stock, Two of holders of Second Preferred Stock, Three of holders of Common Stock to manage the affairs of the Company until the next annual meeting or until their successors, shall have been elected and qualified.

The President appointed Tylar B. Thompson and Fred T. Sterling as Tellers, and the stockholders then proceeded to cast their ballots. After all the votes had been cast, and the Tellers had counted the ballots, the following report was read:

Missoula, Mont., Sept. 4, 1893.

To the Stockholders of Missoula Mercantile Company,

Gentlemen: We, the undersigned having been appointed Tellers, at an election of Seven (7) Trustees of the Missoula Mercantile Co., held this day respectfully report the vote cast as follows:

For Trustees of First Class, or those holding First Preferred Stock.

E. L. Bonner	received	10,586	shares
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R. A. Eddy	"	10,586	"
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for Trustees of Second Class, or those holding Second Preferred stock,

A. B. Hammond	received	10,586	shares
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C. H. McLeod	"	10,586	"
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For Trustees of Third Class, or those holding Common Stock,

Tylar B. Thompson	received	10,586	shares
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John M. Keith	"	10,586	"
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Fred T. Sterling	"	10,586	"
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And would certify that the above-named seven persons have been duly elected Trustees of the Missoula Mercantile Co., for the ensuing year.

(Signed) TYLAR B. THOMPSON.

FRED T. STERLING.

After the reading of the above report, by the Secretary, the President announced, that E. L. Bonner, R. A. Eddy, A. B. Hammond, C. H. McLeod, John M. Keith, Tylar B. Thompson and Fred T. Sterling had been elected Trustees for the ensuing year.

There being no further business, the meeting adjourned.

A. B. HAMMOND.

GUST. MOSER,

Secretary.

Missoula, Montana, September 7, 1893.

Pursuant to call of the President, there was a meeting of the Trustees of the Missoula Mercantile Co., held on this day, there being present E. L. Bonner, A. B. Hammond, C. H. McLeod, Fred T. Sterling, John M. Keith, and Tylar B. Thompson.

The chair was occupied by the President A. B. Hammond, Tylar B. Thompson acting as Secretary.

The President then announced that the first business before the meeting, was the election of a President and Vice-President for the ensuing year.

The Trustees then proceeded to cast their ballot for [328] President, which being counted, showed that A. B. Hammond had received all the votes cast, and was duly declared elected as President of said Company for ensuing year.

The Trustees then proceeded to cast their ballots for Vice-President, which being counted, showed that C. H. McLeod had received all the votes cast, and was duly declared elected as Vice-President of said Company for ensuing year.

The President then announced that he had appointed as Executive Committee for ensuing year, C. H. McLeod, Tylar B. Thompson and John M. Keith which appointments were on motion duly confirmed.

The President then announced that he had appointed Gust. Moser as Secretary and Harry T. Van Wart as Treasurer for ensuing year, which appointments were duly confirmed on motion.

There being no further business the board adjourned.

A. B. HAMMOND.

#### NOTICE TO STOCKHOLDERS.

Notice is hereby given that the annual meeting of the stockholders of the Missoula Mercantile Company, for the purpose of electing trustees for the ensuing year, and for such other business as may come before the meeting, will be held at the office of said Company in the city of Missoula, Mont., on Monday September 3, 1894, at 12 o'clock, noon.

GUST. MOSER,  
Secretary.

Missoula, Montana, August 23, 1894.

Missoula, Montana, September 3, 1894.

Pursuant to notice published in the "Missoulian,"  
a [329] daily newspaper published in the City of



Missoula, and agreeable to and in accordance with the By-Laws of said Company, there was a meeting of the stockholders of the Missoula Mercantile Co., held at the office of said Company, at 12 o'clock noon on this day, all the stockholders of said Company, being present in person, or represented by proxy duly filed with the Secretary.

On motion, the chair was taken by C. H. McLeod, Vice-President of said Company, Gust. Moser acting as Secretary.

The chairman presented to the meeting the trial balance taken on September 1st, 1894, showing the standing of the Company on that day, which after being duly examined, was on motion approved and ordered filed.

The President then announced that the next business before the meeting was the election of seven (7) Trustees (Two of holders of First Preferred Stock, Two of Second Preferred Stock, and Three of Common Stock), to manage the affairs of said Company, until the next annual meeting, or until their successors, shall have been elected and qualified.

The President then appointed Fred T. Sterling and Tylar B. Thompson as Tellers, and the stockholders proceeded to cast their ballots for Trustees.

After all the votes had been cast, and the Tellers had counted the ballot, they made the following report.

Missoula, Montana, September 3rd, 1894.  
To the Stockholders of the Missoula Mercantile Co.,  
Gentlemen: We, the undersigned, having been appointed Tellers, at an election for Seven (7)

Trustees, of the Missoula Mercantile Co., held on this day would respectfully [330] report as follows:

For Trustees of the First Class, or those holding First Preferred Stock.

E. L. Bonner	received	10,586	votes
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R. A. Eddy	"	10,586	"
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For Trustees of the Second Class, or those holding Second Preferred Stock.

A. B. Hammond	received	10,586	votes
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C. H. McLeod	"	10,586	"
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For Trustees of the Third Class, or those holding Common Stock.

Fred T. Sterling	received	10,586	votes
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Tylar B. Thompson	"	10,586	"
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John M. Keith	"	10,586	"
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and would certify that the above-named Seven persons, have been duly elected Trustees of the Missoula Mercantile Co., for the ensuing year.

(Signed) FRED T. STERLING.

TYLAR B. THOMPSON.

After the reading of the above report, the President declared E. L. Bonner, R. A. Eddy, A. B. Hammond, C. H. McLeod, Fred T. Sterling, Tylar B. Thompson and John M. Keith, the duly elected Trustees of the Missoula Mercantile Co., to serve until the next annual meeting, or until their successors are elected and qualified.

There being no further business the meeting adjourned.

C. H. McLEOD,  
Chairman.

GUST. MOSER,  
Secretary. [331]

Missoula, Montana, September 8th, 1894.

Pursuant to call of the President, a meeting of the Trustees of the Missoula Mercantile Co., was held on this day at twelve o'clock noon, at the office of the Missoula Mercantile Co., there being present, E. L. Bonner, A. B. Hammond, C. H. McLeod, Fred T. Sterling, Tylar B. Thompson, and John M. Keith.

The Chair was occupied by A. B. Hammond, President, Fred T. Sterling acting as Secretary.

The President *was* announced that the first business before the meeting was the election of a President, and Vice-President for the ensuing year.

The Trustees then proceeded to cast their votes for a president for Missoula Mercantile Co., for the ensuing year, which votes on being counted, were all cast for A. B. Hammond, and he was duly declared elected as President for ensuing year.

The Trustees then proceeded to cast their votes for a Vice-President for Missoula Mercantile Co., for the ensuing year, which votes on being counted, were all cast for C. H. McLeod, and he was duly declared elected the Vice-President for ensuing year.

The President then announced that he had appointed as executive committee for ensuing year C. H. McLeod, Fred T. Sterling and Tylar B. Thompson, which appointments were on motion duly confirmed.

The President then announced that he had appointed Harry T. Van Wart as Treasurer and Gust. Moser as Secretary of said Company for ensuing year, which appointments were on motion duly confirmed. [332]

There being no further business the Board adjourned.

C. H. McLEOD,  
Vice-President.

FRED T. STERLING,  
Secretary. [333]

Thereupon plaintiff offered and read in evidence the articles of incorporation of the Big Blackfoot Milling Company, a Montana corporation, which said articles of incorporation are in the words and figures following, to wit:

**[Exhibit—Articles of Incorporation of Big Blackfoot Milling Co., etc.]**

Know all men by these presents that we, the undersigned, have voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of Montana.

**AND WE HEREBY CERTIFY:**

First: That the name of the said corporation is  
“BIG BLACKFOOT MILLING COMPANY.”

Second: That the purposes for which it is organized and formed are to carry on the business of,

a: Buying, owning, building, constructing and operating sawmills, planing-mills, grist mills, and flouring mills.

b: Buying, manufacturing, sawing lumber, rough, dressed, finished, and all building material.

c: Buying and selling grain, flour, and meal.

d: Grinding and manufacturing flour, meal, chop feed, ship stuff, etc.

e: Buying, leasing, owning and otherwise acquiring lands, water power, mill-sites and timber land



necessary to fully carry out and execute the purpose of this organization.

f: To establish, maintain, operate and carry on lumber yards, coal yards and fuel yards, at which may be sold lumber, building material, coal, fuel, etc.

g: Buying, selling and dealing generally in goods, wares and merchandise. [334]

h: Owning, operating and carrying on farms, farming and stock-raising.

i: To do general contract work, such as contracting to build, railroads, turnpikes, dirt roads, wagon roads, building dams, ditches and flumes.

j: To build, contract for building houses, barns, mills, and to own, sell, lease or rent the same.

k: To manufacture, sell, rent and lease electricity for lighting or power purposes.

l: To buy, own, sell, lease, rent, appropriate and divert water for agricultural, mining, power or domestic purposes, and to do and perform all things necessary, proper and incident to carrying out the powers hereinbefore enumerated.

Third: The capital stock of this corporation shall be the sum of Seven Hundred Thousand Dollars (\$700,000).

Fourth: That the said corporation is formed and the terms of its existence shall be twenty years from and after the date of the filing of these articles of incorporation.

Fifth: The said capital stock shall be divided into seven thousand shares of the par value of One Hundred Dollars each.

Sixth: The number of trustees of this corporation shall be seven.

Seventh: That the names and residences of those who are selected and appointed, and who are to manage and conduct the concerns of said Company for the first three months from and after the date of the filing of these articles of incorporation are the following, namely: [335]

A. B. Hammond,	Missoula, Montana.
Richard A. Eddy,	Missoula, Montana.
E. L. Bonner,	Missoula, Montana.
Thos. G. Hathaway,	Missoula, Montana.
C. H. McLeod,	Missoula, Montana.
W. H. Hammond,	Bonner, Montana.
John M. Keith,	Missoula, Montana.

Eighth: That the principal office of said Company shall be at the City of Missoula, County of Missoula, State of Montana, that the principal operations of said Company shall be in the County of Missoula and State of Montana, but the said corporation hereby declare it to be their intention to carry on, conduct, operate and extend the business and operations of said corporation into the several cities and counties of the State of Montana.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 14th day of Nov., 1891.

A. B. HAMMOND.	(L. S.)
RICHARD A. EDDY.	(L. S.)
E. L. BONNER.	(L. S.)
THOS. G. HATHAWAY.	(L. S.)
C. H. McLEOD.	(L. S.)
W. H. HAMMOND.	(L. S.)
J. M. KEITH.	(L. S.)

State of Montana,  
County of Missoula,—ss.

On this 14th day of November, 1891, personally appeared before me, the undersigned, a Notary Public in and for the County of Missoula, State of Montana, [336] C. H. McLeod, E. L. Bonner, A. B. Hammond, Richard A. Eddy, Thos. G. Hathaway, W. H. Hammond and John M. Keith, personally known to me to be the same persons who executed the foregoing articles of incorporation, and who each of them, respectively, acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this the day and year first above written.

[Seal] THOS. C. MARSHALL,  
Notary Public, Missoula County, Montana.

Filed November 18th, 1891, at 9 o'clock A. M., and recorded in Book "J," at page 106.

L. ROTWITT,  
Secretary of State.

Thereupon plaintiff offered and read in evidence the Certificate of Extension of Term of Existence, and of Extension of Business of Big Blackfoot Milling Company, a Montana corporation, which said Certificate of Extension of Term of Existence, and of Extension of Business of Big Blackfoot Milling Company, is in the words and figures following, to wit:

State of Montana,  
County of Missoula,—ss.

I, W. H. Smith, County Clerk and Recorder in and for the said County of Missoula, State of Montana, hereby certify the annexed and following to be a full, true and correct copy of a [337] certain Extension of Corporate Existence and of Extension of Business of Big Blackfoot Milling Company, a Montana corporation (#1014) filed for record July 18th, 1908, at 2:50 o'clock P. M., and recorded in ———, records of Missoula County, Montana, together with the endorsement thereon, as the same appears of record in this office.

Witness my hand and the seal of said Missoula County affixed this 18th day of July, A. D. 1908.

[Seal]

W. H. SMITH,

County Clerk and Recorder.

**CERTIFICATE OF EXTENSION OF THE  
TERM OF EXISTENCE, AND OF EXTENSION  
OF BUSINESS OF BIG BLACK-  
FOOT MILLING COMPANY, A MONTANA  
CORPORATION.**

State of Montana,  
County of Missoula,—ss.

At a special meeting of the stockholders of the Big Blackfoot Milling Company, held at its office and principal place of business in Missoula, Missoula County, State of Montana, on Saturday, June 27, 1908, at two o'clock P. M., after a compliance with the requirements of law, as provided in such cases, it was voted and agreed by said stockholders to extend



the term of the corporate existence of said corporation to forty (40) years from the date of its original incorporation, to wit, [338] November 18, 1891; being for a further and additional term of twenty (20) years from and after November 18, 1911, and until and including November 18, 1931; and also to extend the business of said corporation to another branch, to wit: subscribing for and acquiring by purchase, exchange or otherwise, taking, owning, holding, dealing in, exchanging, selling, assigning, transferring or otherwise disposing of, stocks and shares of stock of other incorporated companies organized under the laws of this or of any other State or of any Territory or Colony of the United States, or of any foreign country; and bonds, negotiable instruments and other obligations and securities, with power to this company to indorse and to guarantee any bonds, negotiable instruments, or other obligations dealt in, or sold by it, or which may be or may have been made or issued by any corporation in which this company shall own a majority of the stock; all of which will more fully appear by reference to a copy of the minutes of said stockholders' meeting, hereinafter fully set out;

NOW, THEREFORE, for the purpose of complying with the law, and for the purpose of extending the term of corporate existence of said Big Blackfoot Milling Company, and of extending its business to another branch, as by law provided in such cases; [339]

We, John R. Toole, a trustee or director of said Big Blackfoot Milling Company, and the Chairman

of the meeting of the stockholders of said company, held on said 27th day of June, 1908, as aforesaid (a copy of the minutes of which said meeting is hereto attached) and D. Gay Stivers, Secretary of said meeting of the stockholders, DO HEREBY CERTIFY AND DECLARE:

1st. That the amount of the capital of the Big Blackfoot Milling Company actually paid in is Four Million Dollars.

2nd. That the time for which the term of existence of said Big Blackfoot Milling Company is extended is twenty (20) years from and after the expiration of the present term of existence, to wit: November 18, 1911, and until and including November 18, 1931.

3rd. That the business of said Big Blackfoot Milling Company is extended to the business or branch of subscribing for, and acquiring by purchase, exchange, or otherwise, taking, owning, holding, dealing in, exchanging, selling, assigning, transferring, or otherwise disposing of, stocks and shares of stock of other incorporated companies organized under the laws of this or of any other State, or of any Territory or Colony of the United States, or of any foreign [340] country; and bonds, negotiable instruments and other obligations and securities, with power to this company to indorse and to guarantee any bonds, negotiable instruments, or other obligations dealt in or sold by it, or which may be or may have been made or issued by any corporation in which this company shall own a majority of the stock;

4th. That the whole amount of debts and liabilities of said Big Blackfoot Milling Company is the sum of Three Million, Fifty thousand, Three hundred and fifty-four dollars.

We do further CERTIFY AND DECLARE: That the copy hereto attached and marked "COPY OF MINUTES OF SPECIAL MEETING OF STOCKHOLDERS OF BIG BLACKFOOT MILLING COMPANY, JUNE 27, 1908," is a full, true and correct copy of the minutes of the meeting of the stockholders of said Big Blackfoot Milling Company, held at the office of said company at Missoula, County of Missoula, State of Montana, on June 27, 1908, at two o'clock P. M. of said day; and that all the things and proceedings were had as therein recited and recorded.

IN TESTIMONY WHEREOF the said John R. Toole, Chairman of said stockholders' meeting has hereunto subscribed his name; and the said D. Gay Stivers, Secretary of [341] said meeting, has countersigned this certificate, and a majority of the Directors of said Big Blackfoot Milling Company have signed the same, this 27th day of June, A. D. 1908.

JOHN R. TOOLE,  
Chairman.

Countersigned:

D. GAY STIVERS,  
Secretary.

JOHN D. RYAN,

B. B. THAYER,

JOHN R. TOOLE,

A Majority of the Directors.

State of Montana,  
County of Missoula,—ss.

John R. Toole, Chairman of the meeting of the stockholders of the Big Blackfoot Milling Company, held June 27, 1908, as set forth in a copy of the minutes of said meeting, hereto attached, being first duly sworn, on his oath, deposes and says: That the matters and things set forth in the foregoing certificate, as well as those set forth in the copy of the minutes of said stockholders' meeting, attached hereto, are true.

JOHN R. TOOLE.

Subscribed and sworn to before me this 27th day of June, A. D. 1908.     .[342]

[Seal]

HENRY C. STIFF,

Notary Public Within and for Missoula County,  
State of Montana.

State of Montana,  
County of Missoula,—ss.

On this 27th day of June, in the year nineteen hundred and eight, before me, Henry C. Stiff, a Notary Public within and for the County of Missoula, State of Montana, personally appeared John R. Toole, known to me to be the person whose name is subscribed to the foregoing certificate as Chairman of said meeting, and acknowledged to me that he executed the same.

IN TESTIMONY WHEREOF, I have hereunto



set my hand and Seal, the day and year in this certificate first above written.

[Seal] HENRY C. STIFF,  
Notary Public Within and for Missoula County,  
State of Montana.

COPY OF MINUTES OF SPECIAL MEETING  
OF STOCKHOLDERS OF BIG BLACK-  
FOOT MILLING COMPANY, JUNE 27,  
1908.

Missoula, Montana, June 27, 1908.

The Secretary of the Big Blackfoot [343] Milling Company, a Montana corporation, and a majority of the trustees or directors of said company, having heretofore given notice of a special meeting of the stockholders of said company to be held at the principal office and place of business thereof, in Missoula, Missoula County, State of Montana, on Saturday, June 27, 1908, at two o'clock P. M. of said day, which said notice is in words and figures as follows, to wit:

“NOTICE.

NOTICE IS HEREBY GIVEN: That a special meeting of the stockholders of the Big Blackfoot Milling Company is hereby called, and will be held at its principal place of business in Missoula, Missoula County, Montana, on Saturday, June 27, 1908, at two o'clock P. M. for the purpose of considering the advisability of extending its business so as to permit the acquisition, exchange and sale of stock in other incorporated companies, and bonds, negotiable instruments and other obligations and securities, and to extend the term of its corporate existence

twenty years, to wit, until November 18, 1931.

JOHN D. RYAN,  
JOHN R. TOOLE,  
F. P. ADDICKS,  
B. B. THAYER,  
A. J. SHORES,

Directors.

D. GAY STIVERS,  
Secretary." [344]

In pursuance of said notice, the stockholders of said Big Blackfoot Milling Company met at the time and place mentioned therein, and said meeting was thereupon organized by choosing and electing John R. Toole, one of the trustees or directors of said corporation, as Chairman of said meeting; and thereupon, D. Gay Stivers, a suitable person, was by the stockholders thereat chosen as Secretary of the meeting.

A roll-call of the stockholders of the company was then made and had; and therefrom it appeared that there were present at the meeting, in person or by proxy, 6,400 shares of the capital stock of the company, being all of the capital stock of said company issued and outstanding, and representing more than two-thirds of the entire capital stock of the company.

Thereupon the affidavit of R. R. Wilbur was presented and filed, showing that the notice to the stockholders (copy of which is hereinbefore set forth) was published in the "Daily Missoulian," a newspaper published at Missoula, Missoula County, Montana, at least six (6) successive weeks previous to the day

fixed for holding said meeting.

The affidavit of D. Gay Stivers, was also presented and filed, showing that a written copy of the same notice had been deposited [345] in the postoffice at Missoula, Missoula County, Montana, addressed to each stockholder of record at his usual place of residence, at least six (6) weeks previous to the day fixed for holding said meeting; which said notice specified the object of the meeting, the time and place, when and where such meeting should be held, and the length of time for which it is proposed to extend the term of existence of the corporation, and the business to which the company would be extended or changed.

It appearing that all the steps required by law in such cases had been taken and that all notices had been given and published, as required by law, it was decided by those present, by proxy, and in person, to proceed to vote upon the propositions set forth in said notice, to wit, the extension of the term of existence of the Big Blackfoot Milling Company for the further and additional period of twenty (20) years from and after the date of the expiration of its original incorporation, to wit, until the 18th day of November, 1931; and the extending of the business of said corporation to the branch of business of subscribing for and acquiring by purchase, exchange or otherwise taking, owning, holding, dealing in, exchanging, selling, assigning, transferring or otherwise disposing of, [346] stocks, and shares of stock of other incorporated companies organized under the laws of this or of any other state, or of the



Territory or Colony of the United States or of any foreign country; and bonds, negotiable instruments and other obligations and securities, with power to this company to indorse and to guarantee any bonds, negotiable instruments, or other obligations dealt in or sold by it, or which may be or may have been made or issued by any corporation in this company shall own a majority of the stock; and that the articles of incorporation of said Big Blackfoot Milling Company be amended by inserting therein at the end of the paragraph designated "SECOND" the following, to wit:

"(m) Subscribing for and acquiring by purchase, exchange or otherwise, taking, owning, holding, dealing in, exchanging, selling, assigning, transferring or otherwise disposing of, stocks, and shares of stock of other incorporated companies organized under the laws of this or of any other State, or of any Territory or Colony of the United States, or of any foreign country; and bonds, negotiable instruments, and other obligations and securities, with power to this company to indorse and to guarantee any bonds, negotiable instruments, [347] or other obligations dealt in or sold by it, or which may be or may have been made or issued by any corporation in which this Company shall own a majority of the stock."

Thereupon a vote was taken upon each of said propositions; and upon the vote being counted and canvassed, it was shown and did appear that 6,400 votes had been cast, and of these 6,400 votes, all were in favor of said propositions submitted, to wit, to in-



crease the term of existence of the Big Blackfoot Milling Company for the additional term of twenty years from and after the termination of its present existence, and until and including the 18th day of November, 1931; and to extend the business of said Big Blackfoot Milling Company to the branch of subscribing for and acquiring by purchase, exchange or otherwise taking, owning, holding, dealing in, exchanging, selling, assigning, transferring or otherwise disposing of, stocks and shares of stock of other incorporated companies organized under the laws of this or of any other State, or of any Territory or Colony of the United States; or of any foreign country; and bonds, negotiable instruments and other obligations and securities, with power to this company to indorse and to guarantee any bonds, negotiable instruments [348] or other obligations dealt in or sold by it or which may be or may have been made or issued by any corporation in which this company shall own a majority of the stock; and to amend the articles of incorporation by adding the paragraph or provision above specified; and that there were no votes cast against either or any of said propositions.

It appearing that more than two-thirds of all the shares of stock of said corporation had been voted in favor of each of said propositions, as hereinbefore set forth, the Chairman declared each of said propositions carried, and that the term of existence of the corporation be extended accordingly, and that the business of said corporation be extended and changed in accordance therewith, and that the articles of in-

corporation be amended as hereinbefore specified.

Thereupon the Chairman and Secretary of the meeting were instructed to prepare, verify, acknowledge, file and have recorded the proper certificate showing all proceedings had at said meeting, and in all other respects to comply with the requirements of law in such cases.

Whereupon the meeting of the stockholders adjourned.

JOHN R. TOOLE,  
Chairman.

D. GAY STIVERS,  
Secretary. [349]

We, John R. Toole, Chairman, and D. Gay Stivers, Secretary, respectively, of the special meeting of the stockholders of the Big Blackfoot Milling Company (minutes of which are hereto attached), and the undersigned, a majority of the Board of Trustees or Directors of said Big Blackfoot Milling Company, DO HEREBY CERTIFY:

That the foregoing is a full true and correct copy of the minutes and proceedings of the special stockholders' meeting of said Big Blackfoot Milling Company, held at the office and principal place of business of said company, at Missoula, Missoula County, Montana, on June 27, 1908, at two o'clock P. M. of said day, in pursuance of the notice, a copy of which is therein set out.

IN TESTIMONY WHEREOF, we have hereunto

set our hands this 27th day of June, A. D. 1908.

JOHN R. TOOLE,  
Chairman.

D. GAY STIVERS,  
Secretary.

JOHN D. RYAN,  
B. B. THAYER,  
JOHN R. TOOLE,

A majority of the Board of Directors of the Big  
Blackfoot Milling Company.

(Endorsed:)

I certify that I received and filed [350] this instrument for record on the 18th day of July, 1908, at 2:50 o'clock P. M.

W. H. SMITH,  
County Recorder.

Filed for Record Oct. 19th, 1908, at 2:30 o'clock P. M. and Recorded in Volume E-1, page 145.

A. N. YODER,  
Secretary of State.

Thereupon plaintiff offered and read in evidence the articles of incorporation of the Blackfoot Milling and Manufacturing Company, a Montana corporation, which said articles of incorporation are in the words and figures following, to wit:

**[Exhibit—Articles of Incorporation of Blackfoot  
Milling & Manufacturing Co., etc.].**

Know all men by these presents, that we the undersigned, have this day, voluntarily associated ourselves together for the purpose of forming a corpo-

ration, under the laws of the Territory of Montana.

And we hereby certify:

First. That the name of said Corporation is  
“Blackfoot Milling and Manufacturing Company.

Second. That the purposes for which it is formed,  
are to carry on a general manufacturing business;  
To purchase, hold, erect and maintain saw mills,  
build dams, Booms, and Flumes, holding, hauling,  
and transporting logs and lumber; to manufacture,  
buy and sell lumber and shingles. To manufacture  
all kinds of dressed lumber, doors, sash, blinds, and  
mouldings, building materials and all other articles  
[351] usually manufactured in such mills and fac-  
tories. To build, construct and maintain, booms,  
dams, flumes, canals and ditches, for the purpose of  
supplying water power and facilities, running and  
operating machinery of various kinds, and to supply  
water for agricultural, domestic and other useful  
and beneficial purposes. And to sell, lease and dis-  
pose of such water and water power. To carry on  
a general Mercantile business, buy and sell all kinds  
of Merchandise and all kinds of Country Produce  
and Manufactured Articles. To build, erect and  
operate Mills Smelters and other works, for the pur-  
pose of Crushing, smelting, reducing and refining  
ores of all kinds, and to crush, smelt and reduce and  
refine Ores; to buy, sell, handle and deal in all kinds  
of Ores and Bullion. To purchase, hold erect and  
maintain all necessary machinery and appliances, to  
manufacture and produce electric light; and to fur-  
nish electric light to light Mills, Factories, Towns,  
Public Streets, Buildings, and residences and to



erect, maintain all necessary poles, wires and circuits for the use of the same. And for the same purpose to obtain and hold all necessary franchises and privileges to be used in connection with said business, and to sell and dispose of the same whenever it may be deemed necessary so to do. To purchase, locate, appropriate and hold water and water rights and privileges for useful and beneficial purposes, with power to sell and dispose of the same. To build, erect and maintain Flouring Mills and Manufacture Flour and such other articles of Food as are usually manufactured from the different kinds of grain, and to buy and sell all kinds of grain Flour and other articles that may be manufactured at such Mills. [352] And for the purpose of successfully carrying out the objects for which this corporation is formed, to purchase and hold real estate and to sell and dispose of the same.

Third. That the place where its principal business is to be transacted shall be in the Town of Missoula, Missoula County, Montana Territory.

Fourth. That the term for which it is to exist is to be Twenty years, from and after the date of its incorporation.

Fifth. That the number of its Trustees shall be nine (9) and the names and residences of those who are appointed to manage the affairs of the company for the first three months are

Charles H. McLeod of Missoula, Montana.  
John M. Keith, “ Missoula, Montana.  
Charles E. Beckwith, “ Missoula, Montana.  
George L. Hammond, “ Sunset, Montana.  
Edwin A. Winstanley, “ Missoula, Montana.  
Charles B. Dawes, “ Bonner, Montana.  
Thomas C. Marshall, “ Missoula, Montana.  
Howard P. Heacock, “ Florence, Montana.  
Michael J. Connell, “ Butte City, Montana.

Sixth. That the amount of the capital stock of the corporation shall be three hundred thousand (\$300,000) Dollars, divided into Three Thousand Shares of the par value of one hundred (100) Dollars each.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 21st day of January, 1888.

CHARLES H. McLEOD.

JOHN M. KEITH.

CHARLES E. BECKWITH.

GEORGE L. HAMMOND.

EDWIN A. WINSTANLEY.

CHARLES B. DAWES.

THOS. C. MARSHALL.

HOWARD P. HEACOCK.

MICHAEL J. CONNELL. [353]

Territory of Montana,  
County of Missoula,—ss.

On this 28th day of January, A. D. one thousand eight hundred and eighty-eight, personally appeared before me Gust Moser, a Notary Public in and for said Territory of Montana, Charles H. McLeod, John M. Keith, Charles E. Beckwith, George L. Ham-

mond, Edward A. Winstanley, Charles B. Daves, Thomas C. Marshall and Howard P. Heacock, to me well known to be the same persons who executed the annexed and foregoing instrument and who acknowledged that they executed the same freely and voluntarily and for the uses and purposes therein mentioned.

[Seal]

GUST MOSER,  
Notary Public.

Territory of Montana,  
County of Lewis & Clark,—ss.

On this 26th day of January, A. D. one thousand eight hundred and eighty-eight, personally appeared before me, Junius G. Sanders, a Notary Public in and for said Territory of Montana, Michael J. Connell, to me well known to be the same person who executed the annexed and foregoing instrument and who acknowledged that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

[Seal]

JUNIUS G. SANDERS,  
Notary Public,  
Montana.

Filed for record in the office of the Secretary of Montana, Feby. 4, at 3 o'clock A. M., A. D. 1888.

WM. B. WEBB,  
Secretary of Montana. [354]

**[Exhibit—Articles of Incorporation of Montana Improvement Co., etc.]**

Thereupon plaintiff offered and read in evidence the articles of incorporation of The Montana Im-

provement Company (Limited), a Montana corporation, which said articles of incorporation are in the words and figures following, to wit:

This is to certify that we, the undersigned, to wit: Edward L. Bonner, Marcus Daly, Michael J. Connell, Washington Dunn, Andrew B. Hammond and Richard A. Eddy, of the Territory of Montana, do hereby associate ourselves together to form and do hereby form an incorporated company, under the general incorporation laws of the said Territory. The corporate name of the said company is hereby declared to be "The Montana Improvement Company (Limited)." The capital stock of the said company shall be Two Million dollars which shall be divided into twenty thousand shares of one hundred dollars each share. The term of the existence of the said company shall be twenty years. The number of the Trustees of the said company shall be five. The names of those who shall manage the concerns of the said company for the first three months are and shall be Edward L. Bonner, and Washington Dunn of the County of Deer Lodge in said Territory, Michael J. Connell and Marcus Daly, of the County of Silver Bow, in said Territory of Montana, and Andrew B. Hammond, of the County of Missoula, in said Territory. The operations and business of said company [355] shall be carried on in Deer Lodge City, Deer Lodge County aforesaid, but it may do business elsewhere in Montana, Idaho and Washington territories.

The objects for which the company is formed are: First: To contract for the construction and equip-



ment and to construct and equip railroads and telegraph lines, military and turnpike roads, canals, docks, locks, bridges, water-works, street railroads, gas and electric light works, elevators, stockyards and other public works; to pay or to receive payment therefor in cash or in stocks, shares, bonds or other securities; and to maintain and operate, rent, lease or sell such railroads, telegraph lines, roads, canals, docks, locks, bridges, waterworks, street railroads, gas works, electric light works, elevators, stock yards and other public works, and to mortgage the same; to pay for or receive payment therefor in cash or in stocks, shares, bonds, notes, or other securities, and to carry freight or passengers on such railroads, and street railroads, and to receive tolls for the same.

Second. To lease and operate and maintain on such terms as may be agreed on, any street or other railroad or railroads, with its or their rolling stock, [356] equipments and appurtenances. Any turnpike or other toll road, any steamship or steamboat line, canal, dock, lock, bridge or other public work and to receive tolls thereon.

Third. To construct or to promote, facilitate or assist in the construction, building, extension, operation or repair of any railroad line, or steamboat line, and to pre-empt, locate, buy, sell, lease, rent and operate any mine of gold, silver, lead, iron, cinnibar, clay, limestone, and coal, and to buy, sell, ship, manipulate and transport the products thereof and to buy, sell, lease, rent, occupy and improve real estate, to divide the same into town lots, erect buildings and towns, and to pre-empt, locate, buy, rent, lease and

supply water for the same, or for manufacturing, irrigation or other purposes, and for such purpose to subscribe for or purchase the stocks or bonds of any such company or any company whatever, except its own, or to guarantee or otherwise secure interest on the bonds or stock of such company or the payment or dividends thereon by pledge or mortgage of the property of this corporation or any part thereof or otherwise.

Fourth. To build, buy, purchase, rent, charter or lease, steamboats to run on the Columbia, Missouri and Yellowstone rivers [357] and the tributaries thereof, and also piers, warehouses, ferry-boats, stages and other means of transportation, and to operate the same and receive tolls or fares therefor.

Fifth. To buy and sell stocks, bonds and shares, borrow and lend money on real or personal security, or otherwise negotiate loans and transact any and all other business usually transacted by a credit or finance company.

Sixth. To buy and sell steel, iron, ties, locomotives, cars and any and all other railroad supplies and material.

Seventh. To purchase, acquire, rent, lease, hold, drain, improve, cultivate, lease, mortgage, sell, convey and dispose of improved and unimproved lands and town and city lots and property.

Eighth. To erect, construct, and maintain buildings upon its own property or leased property, for stores, offices, dwellings, warehouses, shops, factories, mills and every other lawful purpose.

Ninth. To pre-empt, locate, purchase, acquire,

hold, open, develop, work, lease, mortgage, sell, convey and dispose of gold, silver, iron, coal, copper, lead, cinnabar, clay, marble, lime and other mines, to buy and sell and manipulate the products thereof; to lease, rent, erect, buy, sell and mortgage, mills and machinery for the working thereof. [358]

Tenth. To prospect for mineral ore; to produce, refine, buy and sell the same.

Eleventh. To build, lease, rent, use wharves, docks and piers.

Twelfth. To discover, locate, pre-empt, purchase, lease and rent banks of sand and clay, for the manufacture of cement, artificial stone, brick, fire-brick, pottery, tile, stone-ware, and to manufacture the same; and buy and sell the products thereof.

Thirteenth. To locate, purchase, sell, lease or rent timber lands; to buy stumpage on timber lands; to cut, transport, buy and sell the same; to manufacture the same into doors, blinds, sash, ship timber, lumber, and all other manufacture of which said lumber is capable.

Fourteenth. To erect, construct, buy, lease, rent and operate grist and flouring mills and to sell, lease and rent the same.

Fifteenth. To buy flour, wheat, oats, barley, corn and all kinds of farm produce, and to sell the same.

Sixteenth. To buy, lease and hire, horses, cattle, hogs and sheep and to sell, lease and hire the same.

In testimony whereof we have hereunto subscribed our names this First day of August, A. D. 1882.

[359]



## In Presence of

H. S. Reed.	EDWARD L. BONNER.	(Seal)
Wm. L. Hoge.	MARCUS DALY	(Seal)
Wm. L. Hoge.	MICHAEL CONNELL.	(Seal)
H. S. Reed.	WASHINGTON DUNN.	(Seal)
Frank H. Woody.	ANDREW B. HAMMOND.	(Seal)
Frank H. Woody.	RICHARD A. EDDY.	(Seal)

Territory of Montana,  
County of Silver Bow,—ss.

On this first day of August, A. D. one thousand eight hundred and eighty-two, personally appeared before me, Wm. L. Hoge, a Notary Public in and for said County, Marcus Daly and Michael J. Connell, whose names are subscribed to the annexed instrument as parties thereto, personally known to me to be the same persons described in and who executed the said annexed instrument as parties thereto, and they severally duly acknowledged to me that they had so executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my Official Seal the day and year in this certificate first above written.

[Seal]

WM. L. HOGE,  
Notary Public.

Territory of Montana,  
County of Deer Lodge,—ss. [360]

On this eighth day of August, A. D. one thousand eight hundred and eighty-two, personally appeared before me, Henry S. Reed, a Notary Public in and for said Territory, Edward L. Bonner and Washington Dunn, whose names are subscribed to the



annexed instrument as parties thereto, personally known to me to be the same persons described in and who executed the said annexed instrument, as parties thereto, and who each for himself, duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, the day and year in this certificate first above written.

[Seal]

HENRY S. REED,  
Notary Public.

Territory of Montana,  
County of Missoula,—ss.

On this 26th day of August, A. D. one thousand eight hundred and eighty-two, personally appeared before me, Frank H. Woody, a Notary Public in and for said county Richard A. Eddy and Andrew B. Hammond, whose names are subscribed to the annexed instrument as parties thereto, personally known to me to be the same persons described [361] in and who executed the said annexed instrument as parties thereto, and they severally duly acknowledged to me that they had so executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate first above written.

[Seal]

FRANK H. WOODY,  
Notary Public.

Territory of Montana,  
County of Deer Lodge,—ss.

I, James S. McAndrews, County Clerk and Recorder within and for the County aforesaid, do hereby certify that I have carefully compared the foregoing with the certificate of incorporation of “The Montana Improvement Company (Limited)” on file in my office and find the same to be a duplicate thereof.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said county at Deer Lodge City this 12th day of September, A. D. 1882.

JAMES S. McANDREWS,  
County Clerk.

(Endorsed:)

Filed for record in the office of the Secretary  
[362] of Montana Territory, September 18, 1882.

ISAAC D. McCUTCHEON,  
Secretary.

Recorded in Book “B” of Incorporations, pages 273, etc.

Q. I invite your attention to page 57 of this book, (stock book of Missoula Mercantile Company), where it reads as follows: Stockholder’s name; Big Blackfoot Milling Company; P. O. Address; Bonner, Montana. Dr.; Cr.; under that heading the following entry, 1898, October 27, Journal folio 4, Certificate number 38, number of shares 22; dated 1892, February 1, Journal folio 3, number of certificate 38, number of shares 22. The latter date and entry

(Deposition of C. H. McLeod.)

being the date on which the shares of stock were issued to the Big Blackfoot Milling Company. Does this record show from your examination that the 22 shares of stock in the Missoula Mercantile Company were issued to the Big Blackfoot Milling Company on February 1, 1892?     A. I expect that is correct.

Q. And that the certificate of stock so issued on February 1, 1892, to the Big Blackfoot Milling Company was surrendered and cancelled on October 27, 1898?     A. This record is correct.

(Witness continuing:) I think that the Big Blackfoot Milling Company acquired that stock in the way of securing that account; Mr. Ross at one time worked for the Big Blackfoot Milling Company, and I think when he left their employ he owed them some money, and turned that stock over to secure them against loss. [363]

Cross-examination.

I think the Bonita Mill was built in 1885; the firm of Eddy-Hammond & Company went out of all lumber business in 1883; the Northern Pacific Railroad Company practically had concluded its contracts for ties along this part of the road at that date.

Q. Now, in view of those facts then, can you not answer definitely whether or not any timbers were furnished by Eddy-Hammond & Company to the Northern Pacific Railway under its contract, that were cut and sawed at the Bonita Mill?

A. Eddy-Hammond & Company sold out their lumber business, I think, in the early part of 1883 to the Montana Improvement Company, and as the

(Deposition of C. H. McLeod.)

railroad was finished through this country in July, I think, 1883, Eddy-Hammond & Company could not have sawed any timber or ties for the railroad at the Bonita Mill in 1885. No timbers were sawed at the Bonita Mill for Eddy-Hammond for the Northern Pacific contract at that time.

Wednesday, January 22, 1913.

**[Testimony of U. S. Swartz, for Plaintiff  
(Recalled).]**

U. S. SWARTZ, a witness who had been called and sworn on behalf of the plaintiff, was recalled by the plaintiff and testified as follows:

**Direct Examination.**

I testified that I surveyed and marked the lines around the sections involved in this suit. In doing this work I acted as follows: On the boundary lines of the sections I ran the lines or replaced the old Government lines where I could find them, and where I could not find them I ran a correct line between the corners and blazed them with an ax on each side of the [364] trees, making a scalping on each side of the tree the way the line was to run, that is, if the line ran north, on the north side of the tree, and if a line ran south, on the south side of the tree—either north or south, as the case might be. That was the common way of blazing a line. Then whenever I subdivided I would subdivide from quarter post to quarter post, running the line through and blazing the line on the trees in the same manner as on a section line; where the trees had all been cut



(Testimony of U. S. Swartz.)

and none were there, I would either put up stakes and mark them, blaze the stakes with the same kind of a blaze, or blaze the stumps wherever one happened to come directly on the line. After I did this, I indicated to the men where they were to do the scaling and the counting of the stumps and the manner in which I had marked the lines. I was present in the Blackfoot country about the year 1912 with Jack Cunningham. We were on the southeast quarter of section 28-14-14. At that time I pointed out to Cunningham where the northwest quarter of section 34, same township and range, was located. I am familiar with the location, by section number, of the mill which we have designated throughout the trial as the Bonner Mill. It is on sections 21 and 22, township 13 north, range 18 west.

#### Cross-examination.

I did all of the surveying for the Government that is involved in this suit. As to the northwest quarter of section 2, township 14 north, range 14 west, I also surveyed that tract. It is a fact that I found that land to be a virgin section, without anything cut off. I don't know how that mistake came about. I did survey the land that was cut, without a doubt, but put down evidently the wrong description, at the head of my survey. I personally of my own knowledge know [365] nothing about this timber cutting and I don't know as a matter of personal knowledge who took the timber.

#### Redirect Examination.

I did find a quarter section in the vicinity of this

(Testimony of U. S. Swartz.)

northwest quarter of section 2-14-14 that had been cut; but I put a wrong description at the head of it, making an error in putting down the description of the land, and I think the Government made a mistake in charging the defendant with something that had never been cut for that reason. It was merely a clerical error on my part.

Mr. HALL.—We ask your Honor for an order requiring the defendant's counsel to produce the corporate records of the Montana Improvement Company, including the minute-book and the stock books of that corporation.

The COURT.—What is the object of it, to disclose the stockholders and officers of that corporation?

Mr. HALL.—Yes, that is the purpose of calling for those books.

The COURT.—The motion will be granted.

Mr. WHEELER.—We answer that the evidence shows who the stockholders in that corporation were. That is a defunct corporation, your Honor, and went out of existence long ago. We answer that we neither have the books in our possession, nor under our control and we do not know where they are. The corporation died some twenty years ago.

The COURT.—There are some fragmentary statements in the record as to who the stockholders were. The evidence does not purport to show who all of the stockholders were. It does tend to show some of them and who the managing people were, but they are entitled to those books if you [366] have them.

If you have not got them, why, of course, you cannot produce them.

Mr. WHEELER.—We answer that we have not got them. We make proffer of all our witnesses, the principal witnesses, or any witness to that effect, if counsel wishes.

Mr. HALL.—My understanding of the matter is, that counsel has stated to me privately that those records have been lost and destroyed. Mr. Roberts told me that they were sent to New York to be used in another case and that they were never returned.

Mr. WHEELER.—Away back twenty years ago there was some suit in New York involving some of the stock. It is probable that the books were sent there then and they were never sent back. That is the information I have from my client.

Mr. HALL.—We now move that the Court require the defendant to produce the stock books, minute-books and records of the Blackfoot Milling & Manufacturing Company.

Mr. WHEELER.—We answer that we have not got those books in our possession or under our control; moreover, we would object to any uniform drag-net order of that character, for the reason that counsel must lay his finger upon some evidence that would be relevant here in order that the Court might base its order upon that.

The COURT.—There is enough evidence in the case, without it being specifically pointed out, to warrant the production of those books, but if you have not got them, that ends it.

Mr. WHEELER.—We have not got them. Mr.



Hammond [367] is not now and never has been in that company.

Mr. HALL.—We also ask for an order requiring the defendant to produce the books and papers of the Big Blackfoot Milling Company.

Mr. WHEELER.—We answer that the books and papers of the Big Blackfoot Milling Company are not now and never have been in our possession, or under the control of A. B. Hammond, and the evidence shows that the Big Blackfoot Milling Company was transferred in the latter nineties to the Anaconda Company, or some people connected therewith, and they have since operated that corporation and are now operating it.

Mr. HALL.—The corporation is defunct.

Mr. WHEELER.—I don't know what has become of it.

The COURT.—You did not sell the books, you sold the property.

Mr. WHEELER.—On the contrary, we sold the stock, they took the whole thing over.

The COURT.—You did not sell the books of the corporation. A sale of the stock would not carry the books.

Mr. WHEELER.—Certainly not. We sold out everything. I mean we sold out the stock to that company. We are no longer stockholders therein and have not been for many years. [368]

Mr. HALL.—May it please the Court, the plaintiff now desires to offer in evidence a certified copy of the duplicate assessment book of the State of Montana for the year 1891, that portion of the record



here relating to the assessment of lands of the Missoula Mercantile Company for the year 1891—we only ask for that portion of it, one particular item in there.

Mr. WHEELER.—It is the fact, I daresay, your Honor, that counsel wishes to show to the jury that some of the property that is claimed to have belonged to the Blackfoot Milling & Manufacturing Company, or to the Big Blackfoot Milling Company, was actually turned in by the Missoula Mercantile Company and an assessment made to that corporation. We object to the same upon the ground that it is irrevelant, incompetent and immaterial, and hearsay, *res inter alios acta*; it has not been shown that the matter was something that the defendant here had anything whatever to do with, or that he ever knew of its being so turned in, and it is further objectionable upon the ground that we do not know who turned it in. There is no evidence that anybody turned it in.

Thereupon the Court overruled the objection of defendant, to which said ruling of the Court defendant duly excepted.

#### **Defendant's Exception No. 01—A.**

And thereupon the whole of said copy of said part of said duplicate assessment book relating to the assessment of Missoula Mercantile Company for the year 1891 was received in evidence and was marked Plaintiff's Exhibit No. 5.

That from said copy of said part of said duplicate assessment book, it appeared that the Bonner Mill

property, being the Northeast quarter of Section 22, Township 13 North, Range 18 West, was assessed to Missoula Mercantile Company and that the Florence [369] Hotel and Eddy Block and also the Hammond Block were assessed to said Missoula Mercantile Company.

Thereupon plaintiff offered in evidence a certified copy of the duplicate assessment book of the county of Missoula for the year 1892, setting forth assessment of the Missoula Mercantile Company for said year. To the introduction in evidence of said part of said certified copy of said duplicate assessment book, defendant objected, upon the same several and separate grounds as are above stated in EXCEPTION No. 1-A, but which said objections were overruled by the Court.

**Defendant's Exception No. 01-B.**

That thereupon the whole of said part of said copy of said duplicate assessment book for the year 1892 was admitted in evidence and marked Plaintiff's Exhibit No. 6; and it appeared therefrom that the Bonner Mill property being the Northeast quarter of Section 22, Township 13 North, Range 18 West, was assessed to Missoula Mercantile Company and that the Florence Hotel and Eddy Block and also the Hammond Block were assessed to Missoula Mercantile Company.

That thereupon plaintiff offered in evidence a certified copy of part of the duplicate assessment book of the County of Missoula for the year 1893, setting forth assessment of the Missoula Mercantile Company for said year. To the introduction in evidence

of said part of said certified copy of said duplicate assessment book, defendant objected, upon the same several and separate grounds as are above stated in Exception No. 1-A, but which said objections were overruled by the Court.

**Defendant's Exception No. 01-C.**

That thereupon the whole of said part of said copy of said duplicate assessment book for the year 1893 was admitted [370] in evidence and marked Plaintiff's Exhibit No. 7; and it appeared therefrom that the Bonner Mill property, being the Northeast quarter of Section 22, Township 13 North, Range 18 West, was assessed to Missoula Mercantile Company and that the Florence Hotel and Eddy Block and also the Hammond Block were assessed to Missoula Mercantile Company.

Thereupon plaintiff offered in evidence a certified copy of part of the duplicate assessment book of the County of Missoula for the year 1894, setting forth assessment of the Missoula Mercantile Company for said year. To the introduction in evidence of said part of said certified copy of said duplicate assessment book, defendant objected, upon the same several and separate grounds as are above stated in Exception No. 1-A, but which said objections were overruled by the Court.

**Defendant's Exception No. 01-D.**

That thereupon the whole of said part of said copy of said duplicate assessment book for the year 1894 was admitted in evidence and marked Plaintiff's Exhibit No. 8; and it appeared therefrom that the



said Bonner Mill property, the Florence Hotel and Eddy Block, Eddy Residence, E. L. Bonner residence, "W. H. Hammond residence, \$2500.00" and "W. H. Hammond Levasseur house, \$400.00" were assessed to Missoula Mercantile Company.

Thereupon plaintiff offered in evidence a certified copy of part of the duplicate assessment book of the County of Missoula for the year 1890, setting forth assessment of the Missoula Mercantile Company for said year. To the introduction in evidence of said part of said certified copy of said duplicate assessment book, defendant objected, upon the same several and separate grounds as are above stated in Exception No. 1-A, but which said objections were overruled by the Court.

**Defendant's Exception No. 01-E. [371]**

That thereupon the whole of said part of said copy of said duplicate assessment book for the year 1890 was admitted in evidence and marked Plaintiff's Exhibit No. 9; and it appeared therefrom that 6,750,000 feet of lumber and 4,000,000 feet of logs were assessed to Missoula Mercantile Company, and that the Florence Hotel and Eddy Block were assessed to Missoula Mercantile Company.

Thereupon plaintiff offered in evidence a certified copy of part of the duplicate assessment book of the County of Missoula for the year 1890, setting forth assessment of the Missoula Mercantile Company for said year. To the introduction in evidence of said part of said certified copy of said duplicate assessment book, defendant objected, upon the same several and separate grounds as are above stated in



Exception No. 1-A, but which said objections were overruled by the Court.

**Defendant's Exception No. 01-F.**

That thereupon the whole of said part of said copy of said duplicate assessment book for the year 1890 was admitted in evidence and marked Plaintiff's Exhibit No. 10; and it appeared therefrom that the Bonner Mill property, being the Northeast quarter of Section 22, Township 13 North, Range 18 West, was assessed to Missoula Mercantile Company, and that the Florence Hotel and Eddy Block and also the Fowler Mill, the Tyler Mill, the McClain Mill and the Silver Thorn Mill and outfit were assessed to Missoula Mercantile Company.

Thereupon plaintiff offered in evidence a certified copy of part of the duplicate assessment book of the County of Missoula for the year 1895, setting forth assessment of the Missoula Mercantile Company for said year. To the introduction in evidence of said part of said certified copy of said duplicate assessment book, defendant objected, upon the same [372] several and separate grounds as are above stated in Exception No. 1-A, but which said objections were overruled by the Court.

**Defendant's Exception No. 01-G.**

That thereupon the whole of said part of said copy of said duplicate assessment book for the year 1895 was admitted in evidence and marked Plaintiff's Exhibit No. 11; and it appeared therefrom that the Bonner Mill property, being the Northeast quarter of Section 22, Township 13 North, Range 18, was

(Deposition of Frank Foster.)

assessed to the Missoula Mercantile Company; and that the Hammond Block, Florence Hotel and Eddy Block, and Eddy residence; also "W. H. Hammond residence \$2500.00" and "W. H. Hammond Levasseur house, \$400.00" were assessed to Missoula Mercantile Company. [373]

Thereupon the plaintiff rested.

**[Deposition of Frank Foster, for Defendant.]**

The deposition of FRANK FOSTER, a witness called and sworn on behalf of the defendant, was offered and read in evidence by the defendant, as follows:

Direct Examination.

I reside at Paradise, Montana; by occupation I am a farmer; am forty-eight years old. **I was at one** time familiar with the tract of land known as the Henry F. Edgar claim, embracing the southeast quarter of section 28, 14-14. I first went on to the land in December, 1885. Henry F. Edgar was my stepfather; his wife was my mother. Mr. Edgar has been dead for nearly two years. Mrs. Edgar has been dead for over six years. When I went to the Edgar claim in December, 1885, Mr. and Mrs. Edgar were living on the claim. Their improvements on the claim consisted of a dwelling-house rough log house, and a bunkhouse for the men that were working for them and a stable. Probably the value of these buildings was at that time \$300.00, at least. The men that Mr. Edgar had working for him, some half dozen men, were occupying the bunkhouse.

(Deposition of Frank Foster.)

These men were engaged in cutting timber, logging it on the river bank. That timber had been cut and was being cut from Mr. Edgar's claim, and most of it had been cut in the immediate vicinity of the house. My best recollection of the amount of timber that Mr. Edgar cut that winter would be somewhere in the neighborhood of 600,000 feet—the only way I can arrive at the amount he cut is that he had two saws running for a month that I know of; they would average 10,000 feet a day to the saw. These logs were banked on the Blackfoot River and went down with the drive the next spring. Mr. Edgar and his men hauled some of them to the bank of the stream—not all—the snow let up; but I think [374] he must have hauled fully three-fourths of the logs he cut that winter. I assisted Mr. Edgar with the hauling of these logs through the winter. As soon as the spring came, he cleared up some land for cultivation, and I helped him with that—making the fences.

Q. What did he do in clearing up the land—did he make any disposition of the tops of the trees?

A. Why, he used some of the tree tops in the construction of his fences, the larger stuff, the decayed stuff and logs that were not fit for use as saw timber, he rolled into heaps and made charcoal of that; he had two charcoal pits that he sold to the logging camp.

(Witness Continuing:) That summer of 1886, I should judge, Mr. Edgar had two or three acres of his claim under cultivation. The crops consisted of vegetables and potatoes, and stuff he could sell to



(Deposition of Frank Foster.)

the logging camps. He only cultivated one piece of land; he cleared up two, but he never made use of the second; the trouble came up in regard to his final proof, and he never went any further with his improvements. The piece of land that he found on was irrigated; for this purpose he dug a ditch, taking the water out of Fish Creek. During that summer Mr. Edgar kept some cattle, horses and chickens. He sold all the charcoal he burned and the vegetables he raised to the logging concern—George Hammond was in charge of it—they made several camps in the river that following summer. All the timber that Edgar had not cut himself was cut during the summer of 1886—there might be a few scattering trees left, but it was virtually all taken off in the summer of 1886. [375]

Q. Do you remember by whom this cutting was done?

A. George Hammond was the man that was in charge of operations there; of course, he had a foreman, a man by the name of Robert Moore; he was the foreman over the crew.

(Witness Continuing:) That summer I became acquainted with a man by the name of John Cunningham; I could not be positive where he was working at that time; to the best of my recollection he worked there with Moore on this Edgar claim cutting that timber for some time; that is where I first met the man. I recall a fire that summer that ran through the timber cutting the tops; that fire extended into the Edgar claim. Mr. and Mrs. Edgar



(Deposition of Frank Foster.)

continued to live on the Henry F. Edgar claim until the spring of 1889; that place was their home continuously, and during the period mentioned, they raised the gardens every year—raised a good deal of garden products—sold it all. During that period he had several cattle and sold butter to the camps. When Mr. Edgar quit there he had in the neighborhood of twenty head of cattle; I would not be positive as to the exact number.

Q. Mr. Foster, you have said that you are a farmer, we would ask you, in your judgment, what was the capability of the Edgar claim for making a farm and home?

A. It was a piece of good agricultural land, after the timber was taken off and the land cleared; the soil was good; it was well watered; it lay flat, convenient for irrigation.

(Witness Continuing:) About one-half of it would be called bottom land; a good share of the side hill was merely slopes; the water [376] could easily be carried on to it and that could have been made use of. The soil in the bottom was good, rich soil, black loam. From a farming standpoint, it was adapted to the production of almost any farming crop; in a country like that I think probably hay would have been the best crop at that time. I recall the tract of land known as the Elijah Cunningham claim, situated in the northwest quarter of section 34, township 14 north, range 14 west and which cornered on the Edgar claim. I first became acquainted with that tract of land shortly after I went

(Deposition of Frank Foster.)

up into that country in 1886. I was over it a dozen times in '86. There was a man named Goodall at that time who located it; he had a cabin up there. At the time I first knew that claim no timber had been cut from it. I continued to be familiar with that claim—Elijah Cunningham claim—until the spring of 1891, when I left there, and when I left no timber had been cut from it, except for building and fencing.

#### Cross-examination.

When I first went to live on the Edgar claim, I was between twenty-one and twenty-two years old. Mr. Edgar was my mother's second husband. I first got acquainted with Mr. Edgar in 1883, in Missoula. The way I happened to go up and live on the Edgar claim was that I had no fixed place of abode; my mother was there and it was natural that I would go there. I helped to work for Mr. Edgar; I assisted him; I was not working for him as a hired man. I certainly was well acquainted with Mr. Edgar at that time. I could not be positive where he was born; he always said he was born in Scotland. He was in his fifties when I first knew him. I could not say what agreement or what arrangement he had with the Hammonds [377] under which he disposed of this timber to them; he was logging, well along with his work when I came up there. I never had any talk with him about the sale of that timber to the Hammonds; he was putting it on the river bank for, I suppose, the Hammonds. I do not recall him ever telling me how he came to take up that claim. It

(Deposition of Frank Foster.)

was naturally a good timber claim, a well located claim. I don't think it is a fact that Mr. Edgar told me he took up that claim at the solicitation of Henry or W. H. Hammond. He had been living on the claim probably two months when I went there in 1885. He had just filed on it previous to going there. Immediately after he went there he commenced these logging operations.

Q. He continued logging operations until all the merchantable timber was cut off that quarter section?

A. He didn't do any further logging in person after that first winter; he always cut, of course, he was paid for it.

(Witness Continuing:) The logging operations on the claim commenced immediately after he settled on there and continued right along, as weather conditions would permit, until the claim was finally stripped of its merchantable timber, and after it was stripped of its timber, Mr. Edgar continued to live there. It is also a fact that the Headquarters of Fish Creek Camp continued in existence, adjoining Mr. Edgar's claim as long as he lived there. From the time the timber was stripped from this land until Mr. Edgar finally left it, he never attempted to cultivate any more than this one small patch. There was no attempt to clear the land and put it into meadow or any other crop other than merely the garden that existed there in the spring of '89. Mr. Edgar finally abandoned this claim and left it. From [378] there he moved down on the Missoula River to a



(Deposition of Frank Foster.)

point called Sperry. During all the time that Mr. and Mrs. Edgar were there on the claim, the principal products that were raised by Mr. Edgar were sold to the Hammond people, at Headquarters Camp. That was the only market in that neighborhood for the sale of anything. Mr. and Mrs. Edgar were on friendly terms with the Hammond people; that was for a good many years, long before they went into the Blackfoot. There was no attempt on Mr. Edgar's part to fence in his entire claim; there was no occasion for it. This fence built around the garden was a log fence. It was the most convenient stuff there was to build a fence with in that country. They did not build rail fences in that neighborhood at that time.

Q. This fence was principally just tree tops from old logs that were not a part of the tree, they would not do for timber?

A. In those days they did not cut timber like they do now; they would use logs now that they would not use then.

(Witness Continuing:) It was the refuse from the merchantable timber; there was very little whole timber. I testified that I was conversant with the fact that Mr. Edgar made proof; he did not get to complete that proof and get his title.

Q. Why was that?

A. The first obstacle was the matter of his citizenship papers; he could not produce them; he had lost them, and as he explained it to me, the records where he primarily had taken out his papers were de-



(Deposition of Frank Foster.)

stroyed in a fire at Fergus Falls, Minnesota, so he had to take out new citizen papers.

Q. Isn't it a fact that he lost that claim by reason [379] of the fact that he could not make his final proof and produce his citizenship papers to show he was a citizen of the United States and entitled to receive patent for that land?

A. He had lived in the territory of Montana then for a long time, twenty-five or thirty years, and had always had the privileges and enjoyments of a citizen, and supposed he was a citizen.

Q. Isn't it a fact that he did not secure his patent to that land solely because he could not show he was a citizen of the United States?

A. I could not say as to that.

Q. That was the trouble?

A. That is what held it back in the first place.

Q. He never did produce his citizenship papers for the Land Office?

A. I think he did. I think he took out papers.

(Witness Continuing:) I do not think it is a fact that the records of the General Land Office show that Mr. Edgar was finally denied a patent to that land because he could not prove he was a citizen of the United States. I never knew that to be a fact. If I did, it has slipped my memory. All the merchantable timber had been taken off the claim when Mr. Edgar left it. I first knew this northwest quarter of 34 as the Elijah Cunningham claim very shortly after he filed on it. He came up there and examined the land, came down to Missoula and filed on it, and

(Deposition of Frank Foster.)

came back and built a house and got me to assist him in building that house. The house was built right on top of the hill, near the west line, near the north-west corner. You could very easily see the entire quarter from the house; you might have to [380] walk a few steps over there to the brow of the hill. I was back and forth lots of times, and I never saw any timber cut off the claim, except such as I cut myself. There was no occasion for making any examination for the purpose of determining whether any timber had been cut off. I did not make any such examination. I think it was Judge F. H. Woody who attended to the making of final proof for Mr. Edgar. His proof witnesses were E. R. Kilburn, George L. Hammond, Basil Micheau and Thomas Hathaway. I am not certain whether Micheau was. These were the witnesses who were advertised. I do not remember who of the advertised witnesses went before the Land Office and made affidavits for Mr. Edgar. I think about 2,000,000 feet of timber was cut off the Edgar claim altogether. Mr. W. H. Hammond cut that timber. My recollection is that Mr. Edgar was paid \$2.50 a thousand on the river bank. The fire that swept through there did not have anything to do with Mr. Edgar leaving the claim finally. It did no damage whatever to the improvements outside of the fence.

#### Redirect Examination.

Mr. Edgar left the claim because he could get no title to the land from the United States Government. It was cancelled. I think Mr. Edgar intended to

(Deposition of Frank Foster.)

make it his home, I always did think so. Mr. Edgar finally took up another claim under the Government as a homestead; that was right at the mouth of the Missoula River, about ten miles east of Plains. That was after he left the Edgar claim that we have been talking about, where he left because he could not get title.

Q. You have touched on the fact of Mr. Edgar's birthplace and earlier life; in what respect is he identified with the history of Montana? [381]

A. He was one of the very earliest settlers, that is, one of the very earliest pioneers, of Montana; he was identified in the early days with the discovery of gold in the territories; he was really the discoverer of gold in Virginia City, and prominently known throughout the territory ever since then.

**[Testimony of John M. Keith, for Defendant.]**

JOHN M. KEITH, a witness called, sworn and examined on behalf of the defendant, testified as follows:

**Direct Examination.**

I reside at Missoula, Montana, and am a banker by occupation. I have been a banker at Missoula since August, 1888. I am connected with the Missoula Trust and Savings Bank, of which I am president, and have been president for the last three years. In the year 1881, I was employed by Eddy-Hammond & Company. At that time Mr. E. L. Bonner, Mr. A. B. Hammond and Mr. R. A. Eddy were the members of that firm, and at that time E. L. Bonner was engaged in business also in Deer Lodge—no other place



(Testimony of John M. Keith.)

that I recall. In Deer Lodge his partner was Mr. Robertson, who was not in any way connected with the copartnership in Missoula of Eddy-Hammond & Company. I knew of contracts that were entered into with the Northern Pacific Railroad Company for the furnishing of ties and bridge timbers and the like, in which Mr. A. B. Hammond, Mr. Eddy, Mr. Bonner and Mr. Robertson were concerned; but I never saw the contract that I know of. I knew of the firm of E. L. Bonner & Company, in which the four gentlemen last mentioned were members. The firm of E. L. Bonner & Company was entirely separate from Eddy-Hammond & Company—Mr. Robertson having an interest in the former while he had none in the latter, and the concern that had the contract with the Northern Pacific [382] Railroad was E. L. Bonner & Company. The Missoula Mercantile Company succeeded to the business of Eddy-Hammond & Company. I think the corporation called the Montana Improvement Company succeeded to the business of E. L. Bonner & Company after E. L. Bonner & Company's contract with the Northern Pacific Railroad Company. My first employment with Eddy-Hammond & Company was as a clerk behind the counter. Shortly after, in 1882, I was taken to the office, and following that up to August, 1888, I was in charge of the office and books of the Missoula Mercantile Company. I was never an employee of the Montana Improvement company. I am familiar with the two corporations known as the Blackfoot Milling and Manufacturing Company and the Big Blackfoot



(Testimony of John M. Keith.)

Milling Company, but I was never employed by either of those corporations. While I was engaged with Eddy-Hammond & Company, that firm, as a firm, was not engaged in the lumber business in any form. As far as I know, the old firm of Eddy-Hammond & Company was never engaged in the lumber business. So far as I know, the Missoula Mercantile Company was never engaged in the lumber business. With reference to the business that was conducted first by Eddy-Hammond & Company and next by the Missoula Mercantile Company, that business was a general merchandise supply business, and the Missoula Mercantile Company succeeded Eddy-Hammond & Company in the same line. At the organization of the Missoula Mercantile Company, I became a stockholder therein; I think I was one of the incorporators. I owned the stock that I had at that time, and from time to time I increased my interest in the Missoula Mercantile Company. I cannot recollect definitely the largest number of shares I ever held in that company—somewhere between two and three hundred shares. I am familiar [383] with the fact that G. W. Fenwick had a contract with the Missoula Mercantile Company; also that Henry Hammond, sometimes called W. H. Hammond, had an account with the Missoula Mercantile Company. Goods, wares and merchandise were sold to these men, respectively. These men gave orders on the Missoula Mercantile Company. I had direct charge of the cashing of those orders. I have seen numerous orders from each of them. They were drawn in

(Testimony of John M. Keith.)

regular order form. The substance of the order was this: The location of the business, the date, to the Missoula Mercantile Company, pay to the order of such and such a person so many dollars and charge the same to my account, signed by the person direct or one authorized. There were no orders drawn while Mr. Fenwick was in charge of the Bonita Mill that were signed by any other person than Mr. Fenwick, or one of his agents; none was ever signed by A. B. Hammond; none was ever signed by the Montana Improvement Company; none was ever signed by Eddy-Hammond & Company. With regard to the mill on the Blackfoot, on Bonner, the orders there were signed in a similar form, signed by W. H. Hammond, or by somebody authorized by him at the mill. As to the name in which these accounts were carried on the books, W. H. Hammond might possibly have been Henry; in that case, sometimes it was under the name of Henry Hammond and sometimes under the name of W. H. Hammond. In the case of Mr. Fenwick, it was George W. Fenwick, or G. W. Fenwick, with regular debit and credit. If an order was drawn and the money paid the individual who drew the order was charged with the amount upon the books of the concern. Other lumber companies had been accustomed to do business that way in that vicinity while George W. Fenwick and Henry Hammond were doing it. [384]

Q. What was the regular course of business with regard to customers who owned mills or who were interested in the lumber business, or in any other

(Testimony of John M. Keith.)

business, in their dealings between them and the Missoula Mercantile Company, with regard to furnishing supplies and cashing their orders at the Missoula Mercantile Company?

A. We had a number of accounts similarly handled where we either sold them goods or paid their men, their employees, on orders issued by them upon us.

(Witness Continuing:) Some of these customers were engaged in business as important and carried a larger account than did G. W. Fenwick—others less, and some of them were engaged in the business of running lumber mills on their own account. There were a number of those outside concerns that had no connection with either A. B. Hammond or with the Montana Improvement Company and that had no interest in and in which the Missoula Mercantile Company had no financial interest other than in that of furnishing them supplies and such are the concerns I have referred to in mentioning these outside mills whose business was carried on in the same way. A. B. Hammond did not, to my knowledge, have any interest whatsoever in the mill at Bonner other than as a stockholder in either the Blackfoot Milling and Manufacturing Company or the Big Blackfoot Milling Company, and so far as my knowledge goes, he did not have any interest whatsoever in the mill of George W. Fenwick at any time, either directly or indirectly.

Cross-examination.

It is possible he might have had some interest in



(Testimony of John M. Keith.)

both of these mills, and I not know it. It may have been [385] that A. B. Hammond, during the time these mills were running, was there and more or less acquainted with their operation. I do not think it is a fact that in regard to these firms in which Mr. Hammond was a partner or a stockholder, that he had a controlling and directing influence over them. He had no controlling interest in the Missoula Mercantile Company. A. B. Hammond had very largely charge and management of the business of E. L. Bonner & Company with the railroad. He was an active person, with Mr. Eddy, in the conduct of the business of Eddy-Hammond & Company and as such gave orders and directions in regard to the same. He and Mr. Eddy, jointly, helped to manage and control the operations of that concern. I don't know whether he was a controlling factor and directing factor of the Montana Improvement Company. I have no knowledge of the Montana Improvement Company other than as a name. He was an active man in the business of the Missoula Mercantile Company, sold goods, with others, as well as being associated in the management of that, like Mr. McLeod, Mr. Bonner and Mr. Eddy.

Q. Wasn't A. B. Hammond's word always taken as the final word and direction when matters were referred between him and Mr. Bonner?

A. I could not say that it was final; we accepted his instructions to a certain extent; along with the head of the institution, Mr. Bonner.

(Witness Continuing:) I do mean to tell the



(Testimony of John M. Keith.)

jury here that Mr. Hammond had no interest whatever in the Fenwick Mill. So far as I know, he had not. It is possible that Mr. A. B. Hammond might have had an interest in that mill, and I might not have [386] known it. It is also true as to the Bonner Mill.

Q. Now, Mr. Keith, they have asked you about the Missoula Mercantile Company carrying various accounts with people that were engaged in the tie and timber business in that vicinity; you know of Mr. Greenough? A. Yes, sir.

Q. The Missoula Mercantile Company carried him to the extent of some \$60,000.00, didn't it?

A. I think I said \$30,000.00 or \$40,000.00.

Q. And is it not also true that if the Missoula Mercantile Company had not carried Mr. Greenough, he could not have carried on those operations?

Defendant objected to the question on the ground that it was irrelevant, incompetent and immaterial, and not cross-examination. The Court overruled said objection, to which said ruling defendant excepted.

### **Defendant's Exception No. 2.**

A. I think that is true of many of them in those days. There were very few persons then who had any amount of means.

(Witness Continuing:) The list that I mentioned included Mr. Fenwick and all that I spoke of. I could not say with reference to George W. Fenwick that it is a fact that he would not have been able to carry on his business at the Bonita Mill if it were

(Testimony of John M. Keith.)

not for the credit that was extended to him by the Missoula Mercantile Company, because I am certain he had an arrangement with Mr. Daly whereby he would advance him money for his work. The Missoula Mercantile Company did extend credit to Mr. Fenwick and to some extent it carried him the same as it did all of [387] these other people. So far as I know, I was not present when they closed between Fenwick and Hammond for the purchase of the Bonita Mill. The purchase price was paid in notes. The Missoula Mercantile Company took over the notes and handled them. These notes were given by Fenwick to Fred A. Hammond. The notes were made payable at different periods.

Q. While Mr. Bonner and Mr. Eddy were absent from Missoula, isn't it a fact that operations were carried on, and that Mr. Hammond was in control?

A. While they were absent?

Q. Yes, while they were away.

A. To a certain extent. Mr. McLeod was also active in the business.

The COURT.—Counsel is asking you when Mr. Eddy was absent.

A. Yes, he surely was.

(Witness Continuing:) I will not say that even when the others were there they all took orders from Mr. Hammond. I think they discussed matters and decided upon certain lines.

Q. But they always went to Mr. Hammond to discuss those matters and talk them over?

A. And Mr. Bonner was the head.

(Testimony of John M. Keith.)

Redirect Examination.

When these notes that G. W. Fenwick gave to Fred Hammond were taken over by the Missoula Mercantile Company, it was in settlement of Fred Hammond's account with the Missoula Mercantile Company. The notes were paid by Mr. Fenwick. As far as my knowledge goes, A. B. Hammond did not have any interest in the mill while Fred A. Hammond was [388] operating it at Bonita. As to the banking facilities that were in the country at that time, there was one bank, a very small institution, with a capital of \$50,000.00, and with deposits of probably \$150,000.00. This was in Missoula. If the Missoula Mercantile Company had not conducted the credit system that it did, financial backing could not have been gotten by the number of persons in the different lines of business at that time through the small banking institution there. That was the only bank in Missoula, and along in '80, '82 and '83, Missoula had less than 1,000 inhabitants. The older cities in Montana at that time were Butte, Helena and Virginia City. They had banks, but they were from one hundred and twenty-five to one hundred and fifty miles distant. There was no other bank in the western part of the State. With relation to the Missoula Mercantile Company's office, the Blackfoot Milling and Manufacturing Company had an office on the second story of the building in which the Missoula Mercantile Company was. The Big Blackfoot Milling Company may have been there for a short time in the same building, but later it was taken to



(Testimony of John M. Keith.)

Bonner, where the operations were carried on. So far as I know, Mr. Fenwick's office was at the mill. Mr. Winstanley had charge of the Blackfoot Milling and Manufacturing Company's books. He was on the second story of the same building at all times, and that was separate and apart from the office of the Missoula Mercantile Company. It had an outside stairway leading to it.

Q. Do you know whether or not Mr. Winstanley acted as the agent for any other mills?

A. He had charge of the books in the same office for a man by the name of H. B. Haycock, for Mr. Fenwick, and [389] I think he had one or two others. I do not recollect definitely. I know, however, he had charge of that matter for Haycock and Fenwick. I think he had to do with Henry Hammond's books. Haycock ran a sawmill, had a sawmill business. His business had nothing whatever to do with the Missoula Mercantile Company other than as it was a patron of that company. Haycock had two or three locations for his mill. One of them was in the Hellgate country, and the other one was up in the Bitter Root Valley. So far as I know, Mr. A. B. Hammond was not in any way whatever connected with Haycock's mill or business.

#### Recross-examination.

To a very large extent all of these companies that the Missoula Mercantile Company backed by credit so that they could handle their business, were engaged in the lumbering business and the tie business. C. P. Higgins, who was the founder of the town of



(Testimony of John M. Keith.)

Missoula, Mr. Kennett, who had filled the position of cashier for many years, and Mr. Houser, were the main stockholders in that bank at Missoula. In the early days it had no connection with the Missoula Mercantile Company. The Missoula Mercantile Company did not become interested in this bank, nor did the people interested in the Missoula Mercantile Company become interested in this bank, until the latter part of 1887 or the early part of 1888, and then as a minority stockholder. There were banks at Butte and Helena. I could not say they had very large deposits at that time. One bank in Helena and one in Butte were reputed to be banks of wealth and importance.

Q. But the Missoula Mercantile Company endeavored, did it not, to get under its control all the handling of these small mills by outside people? [390]

A. It endeavored to secure all the business it could.

(Witness Continuing:) It also endeavored to get hold of the accounts of these millmen and have them buy their supplies at the Missoula Mercantile Company and have them give their orders on it, and the Missoula Mercantile Company carried as many of these accounts as they could secure. It was the aim and object of the Missoula Mercantile Company, during that time, to make itself the banker as well as the merchant for these little companies in the interest of its business, and I think it is quite true that many of them could not have run if they had not done it. In 1887 I quit the employment of the Mis-

(Testimony of John M. Keith.)

soula Mercantile Company and went to the Missoula National Bank, which is the same bank that the Hammonds acquired an interest in in 1887, and I continued in the employment of that bank up until two or three years ago.

**[Testimony of W. H. Hammond, for Defendant.]**

W. H. HAMMOND, a witness, called and sworn on behalf of the defendant, testified as follows:

**Direct Examination.**

I reside in Oakland, California, and have so resided since 1889; my full name is William Henry Hammond, and I am generally known by my friends and intimates as Henry Hammond. I first became acquainted with the Blackfoot River in 1882 and 1883. I constructed a mill on the Blackfoot River in 1885. I knew the firm of Eddy-Hammond & Company. I knew Mr. Bonner, Mr. A. B. Hammond and Mr. Eddy. I was never a member of that firm; I was never directly or indirectly interested in its profits; I knew the Missoula Mercantile Company from the time of its organization; I was never a [391] stockholder in the Missoula Mercantile Company; I was never directly or indirectly interested in the profits of the Missoula Mercantile Company; I have heard of the Montana Improvement Company; I was never a stockholder in it, nor was I ever directly or indirectly interested in its profits. In 1885, when I built the mill upon the Blackfoot, I acquired a dam at or about the time of the inception of my enterprise. I acquired that dam from the Mon-

(Testimony of W. H. Hammond.)

tana Improvement Company. The transaction evidencing it was in writing.

The defendant thereupon offered in evidence, plaintiff's counsel stating he had no objection thereto, deed from the Montana Improvement Company Ltd., to William H. Hammond, dated the 3d day of July, 1885; acknowledged on the 8th day of January, 1886, and recorded on the 8th day of January, 1886, in Book "G" of Deeds, at page 433, records of Missoula County, Montana, and the said deed was marked Defendant's Exhibit "A," and is in the words and figures following, to wit:

**[Defendant's Exhibit "A"—Deed Dated July 3, 1885, The Montana Improvement Co., Ltd., to Wm. H. Hammond.]**

**THE MONTANA IMPROVEMENT COMPANY  
(LIMITED)**

to

**WM. H. HAMMOND.**

This indenture made the third day of July, in the year of our Lord one thousand eight hundred and eighty-five, between the Montana Improvement Company (Limited), a corporation by and existing under the laws of Montana Territory, the party of the first part, and William H. Hammond, of Blackfoot, Missoula County, Montana Territory, the party of the second part, Witnesseth: That the said party of the first part, for and in consideration of the sum of three hundred dollars, lawful money of the United States, to it in hand paid by the said party of the second part, the receipt of which is hereby acknowl-



edged, [392] does remise, release and forever quit-claim unto the said party of the second part and to his heirs and assigns, the following described real estate, situated in the County of Missoula, Territory of Montana, to wit: One (1) cabin and the remainder of what is known as the Blackfoot dam, situated and being on the northwest quarter (NW.  $\frac{1}{4}$ ) of section numbered twenty-two (22), in township numbered thirteen (13) north and range numbered eighteen (18) west, of the principal meridian of Montana Territory, in Missoula County, Montana Territory, together with all the tenements, hereditaments and appurtenances thereunto belonging, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part of, in or to the said premises and every part and parcel thereof. To have and to hold, all and singular, the said premises, with the appurtenances thereunto belonging unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set its hand and official seal the day and year first above written.

THE MONTANA IMPROVEMENT COM-  
PANY, LIMITED, (Seal)

R. A. EDDY, (Seal)

Vice-President.

Signed, sealed and delivered in the presence of

Attest: THOMAS G. HATHEWAY, (Seal)

Secretary.



Territory of Montana,  
County of Missoula,—ss.

On this eighth day of January, A. D. 1886, before me, [393] John L. Sloane, a notary public in and for said Territory, came R. A. Eddy, Vice-president of the Montana Improvement Company (Limited), personally known to me to be the person described in and who signed the foregoing deed as grantor and who acknowledged to me that he was the duly authorized officer of said Company and that he had executed the same freely and voluntarily for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in Missoula, M. T., the day and year first above written.

[Seal]

JNO. L. SLOANE,  
Notary Public.

I certify that I received this instrument for record on the 8th day of January, 1886, at 3:15 o'clock P. M.

ALVIN LENT,  
County Recorder.  
F. H. Schmidt,  
Deputy.

State of Montana,  
County of Missoula,—ss.

I, W. J. Babington, County Clerk and Recorder in and for the said County of Missoula, State of Montana, hereby certify the annexed and following to be a full, true and correct copy of a certain deed from Montana Improvement Company (Limited) to William H. Hammond, filed for record January 8,

(Testimony of W. H. Hammond.)

1886, at 3:15 o'clock P. M. and recorded in Book "G" of Deeds, at page 433, Records of Missoula County, Montana, together with the indorsement thereon, as the same appears of record in this office; that I am the legal keeper of such record and my office is a public office not pertaining to any court.

Witness my hand and the seal of said Missoula County, affixed this 6th day of January, A. D. 1913.

[Seal]

W. J. BABINGTON,

County Clerk and Recorder. [394]

(Witness Continuing:) This Blackfoot dam was near the junction of the Hellgate and the Blackfoot Rivers and is eleven miles east of Missoula.

Q. At the time that you made this purchase, was it an out and out straight business transaction, whereby it was intended that the title, both legal and equitable, should pass to you, or was it intended and agreed among you that you should take title to hold it for some other concern, person or corporation?

Plaintiff objected to the question upon the ground that it is leading and suggestive, and upon the further ground that the instrument speaks for itself as to what it is. Thereupon the court sustained the plaintiff's objection to said question, and defendant noted an exception.

### **Defendant's Exception No. 3.**

(Witness Continuing:) After the acquisition of that property, I built a mill upon the land near to the dam that is referred to in the deed just read. I constructed a dam there. That became what is known as the Bonner mill. The mill was built on section

(Testimony of W. H. Hammond.)

22, township 13 north, range 18 west; and the spot was known as the Blackfoot Mill, afterwards as the Bonner Mill. The name of Bonner was first applied to that spot in 1888, and up to that time it was known as the Blackfoot Mill. I proceeded to operate that mill after its construction until the time that the Blackfoot Milling and Manufacturing Company was incorporated. I operated it individually. I had no copartners in the business; no one else either directly or indirectly shared in the profits of my transactions. I [395] sold the lumber that was produced by that mill that I was operating. I sold it principally in Butte, the mines at Butte, and the smelters at Anaconda. I made my contracts of sale. I continued to operate that mill until February, 1888, when the Company was incorporated. I was the sole owner of that mill in February, 1888, and had been such sole owner at all times prior thereto from the time of its construction. In February, 1888, I disposed of it to the Blackfoot Milling and Manufacturing Company. I became a stockholder in the Blackfoot Milling and Manufacturing Company at the time of the transfer; I had about a quarter interest or share of stock in the Blackfoot Milling and Manufacturing Company. There was other consideration moving to me, in addition to the issuance to me of one-quarter of the stock, for my transfer to the Blackfoot Milling and Manufacturing Company of that property. It was understood that I should have a lease on the property, the mill, for two (2) years, with a privilege of three (3). Such a lease



(Testimony of W. H. Hammond.)

was actually entered into.

Q. I show you a document dated the 10th day of February, 1888, purporting to be between the Blackfoot Milling and Manufacturing Company and William H. Hammond, and I call your attention to the signature, William H. Hammond, is that your signature? A. It is.

(Witness Continuing:) That document was executed February, 1888. I am familiar with the other signature thereto; it is that of Charles H. McLeod. He was at that time president of the Blackfoot Milling and Manufacturing Company. That document is the lease to which I have referred.

Mr. WHEELER.—I offer the document in evidence. [396]

Plaintiff objects to the admission in evidence of said document, for the reason that the document does not bear on its face any authority from the Blackfoot Milling and Manufacturing Company for its execution; it is merely signed by the president; it is not acknowledged before a notary public and it is an instrument affecting the right of possession to real property for more than one year. There is nothing to show that it is the instrument that it purports on its face to be. In other words, the instrument purporting to be executed by the Blackfoot Milling and Manufacturing Company does not bear the seal of that company on it.

The COURT.—The objection will be sustained.

Mr. WHEELER.—This is the document under which the witness took possession.



(Testimony of W. H. Hammond.)

ment was property executed; if it was in writing, it must be shown that it was duly executed or else, of course, you cannot give its contents.

Mr. WHEELER.—Upon that question, counsel and the court differ. I think it is admissible. It shows that it is a document under which this gentleman took possession of this property. It goes to the question of his good faith in everything he did, and in so far as his acts may be imputable to any party to this action, I think it is a proper matter of inquiry.

The COURT.—The question of good faith is not involved in the proposition before the Court at all. Its admissibility in evidence is an absolutely different thing. Of course, we are all circumscribed by the rules of evidence.

Thereupon the Court sustained the objection of the plaintiff and defendant excepted to the ruling of the Court.

**Defendant's Exception No. 5. [399]**

(Witness Continuing:) I operated that property under the lease which I have mentioned in my testimony three years, possibly a little longer.

Q. While you were operating the property under that lease that you have testified to, state how much rental you paid.

Objected to by the plaintiff on the ground that the lease itself should be the evidence of the amount of rental that was to be paid.

Mr. WHEELER.—I am asking him what he paid.

The COURT.—Objection sustained. You have

(Testimony of W. H. Hammond.)

yourself shown the lease to be in writing; to which ruling of the court defendant duly excepted.

**Defendant's Exception No. 6.**

Q. Did you pay rental for this property?

A. I did.

Q. To whom did you pay rental?

Objected to by the plaintiff on the ground that the lease itself should be the evidence of the person to whom the rental was paid.

Objection sustained by the Court; to which ruling defendant duly excepted.

**Defendant's Exception No. 7.**

(Witness Continuing:) I cut and manufactured lumber during the years I was operating that property under a lease. I sold the lumber that I manufactured. Neither the Montana Improvement Company; nor the Missoula Mercantile Company nor A. B. Hammond sold it for me. At the expiration of my lease I had no renewal of same.

Q. Was there any provision of any kind for the extension of the original lease which you have mentioned? [400]

Plaintiff objects to the question on the ground that it calls for the giving of the provisions of the lease.

Objection sustained by the Court; to which ruling defendant duly excepted.

**Defendant's Exception No. 8.**

Q. Did you ever operate that property under what purported to be an extension of any lease?

Mr. HALL.—We interpose the same objection.

(Testimony of W. H. Hammond.)

The COURT.—Objection sustained.

Mr. WHEELER.—Exception.

**Defendant's Exception No. 9.**

(Witness Continuing:) I am not entirely clear, but I believe that after the expiration of the lease, according to its terms, which I have testified to, I believe I did further operate that property. I am not clear whether I operated the property under a lease, but I think I did. At any rate, I did operate that property until the Big Blackfoot Milling Company was organized. I think that company was organized in the latter part of 1891. After the organization of that company, I was its president and manager, and its books were kept at Bonner. The books of the Blackfoot Milling and Manufacturing Company were never kept at Bonner; they had been kept at Missoula. While I was conducting this property, the books were kept in Missoula during the construction of the mill and up until the time that I took the lease. While I was operating as an individual, Mr. Winstanley kept my books in Missoula. When I was operating under the lease that I have referred, Mr. Winstanley kept the books of the Blackfoot Milling and Manufacturing Company. My own books under the lease were kept at Bonner by a man named C. W. Young. I employed Mr. Young. Mr. Winstanley [401] was paid from 1885 until 1888 for the services he rendered in keeping the books. I was president and manager of the Big Blackfoot Milling Company from the time of its organization until the close of 1895, the last date



(Testimony of W. H. Hammond.)

mentioned in the complaint here, and for that matter, until the company was sold out. The stock of the company was sold. I was a stockholder in the Big Blackfoot Milling Company. I don't just remember the number of shares that I owned; I know I owned about a quarter. I testified that I owned about a quarter of the Blackfoot Milling and Manufacturing Company. When we sold out, the Anaconda Mining Company bought the stock. I sold my stock to the Anaconda people. During the time I operated this mill at Bonner for the Big Blackfoot Milling Company and was its president, I was paid a salary by the Big Blackfoot Milling Company. My salary was two hundred dollars (\$200.00) a month during the entire period of time. During the time that I was operating the property as a lessee, I received no salary. Mr. A. B. Hammond never at any time had, either directly or indirectly, in my name any interest in either the Big Blackfoot Milling Company or the Blackfoot Milling and Manufacturing Company. He never directly or indirectly at any time had any interest in the one-quarter, or thereabouts, which I say I owned. He never at any time either directly or indirectly had any share or interest in the profits of the business which may have been earned during the time that I was operating it individually or during the time that I was operating it as a lessee. Mr. A. B. Hammond had nothing to do with the making of any contract for the sale of lumber or timber of the Big Blackfoot Milling Company during the years I was president of the [402]



(Testimony of W. H. Hammond.)

company. Mr. A. B. Hammond had nothing to do with the business while I was conducting it for myself upon the Blackfoot. He had nothing whatever to do with it while I was conducting it as a lessee. While I was conducting the business as president and manager at Bonner for the Big Blackfoot Milling Company, A. B. Hammond had nothing to do with the management of it any more than any other stockholder. I managed the business. I am not certain whether or not A. B. Hammond was a member of the board of directors of the Big Blackfoot Milling Company at that time. A. B. Hammond gave me no instruction of any kind or character concerning my management of that mill. I managed the mill myself. I ran it. The town of Bonner is about twelve miles down the river from where the Longley claim is. During all this period, our operations extended between sixty-five and seventy-five miles along the Blackfoot River. There was never any other case brought by the Government of the United States against me or anybody else in connection with the work that was done while I was operating either as an individual or a lessee or while I was operating as manager of the Big Blackfoot Milling Company along that seventy or seventy-five miles of river other than this present action. I never did any logging upon any portion of the northwest quarter of section 28, township 14 north, range 16 west, while I was operating that property. Nor did I while I was operating it under the lease I have referred to; nor did I while I was acting as presi-

(Testimony of W. H. Hammond.)

dent and manager of the Big Blackfoot Milling Company, but during the time last mentioned I bought some logs from Longley that he cut himself—that was sometime in the winter of 1892 or 1893. This was some timber that had [403] been burned and he had cut it and I bought the logs. There were no other logs that I purchased from that section or that I took to our mill at any time while I was operating it either for myself or the Big Blackfoot Milling Company. I know section 26, in township 14 north range 16 west. I know where sections 23 and 25 of this township and range are. They were logged in 1888 or 1889. I did not in 1889 nor at any time prior to October 22, 1894, cause any logging to be done on the northeast quarter of section 26, and I never directed anybody to cut logs there. I know that my contractor had cut logs for building a bridge and building a camp on section 26. These men were Cunningham and McNamara. I remember taking them to task for having cut logs there. I had given those men instructions with regard to observing the lines, namely, that they should not cut over the lines on the land that was not owned by the company. At that time we had an arrangement with the railroad company whereby we had the right to cut on the odd sections, back from the river, within the limits of the railroad grant, as far as we saw fit. Neither the Blackfoot Milling and Manufacturing Company nor the Big Blackfoot Milling Company ever owned any part of section 20, in township 14 north, range 15 west. I did not any

(Testimony of W. H. Hammond.)

within the one dollar a thousand group and not the fifty cent group.

Defendant thereupon offered and read in evidence a certified copy of a letter sent out by the Department of the Interior, concerning the Edgar claim, under date of May 13, 1886. The said letter was thereupon marked Defendant's Exhibit "B," and is in the words and figures following, to wit:

[Defendant's Exhibit "B"—Letter, Dated May 13, 1886, H. S. Howell to Messrs. Woody & Marshall.]

DEPARTMENT OF THE INTERIOR.

UNITED STATES LAND OFFICE.

Helena, Montana, May 13, 1886.

Messrs. Woody & Marshall,

Missoula.

Gentlemen: I return herewith final pre-emption proof of Henry F. Edgar, as the proofs show him to be a naturalized citizen, and he does not furnish the required declaration of intention. I enclose my check #204 [406] for \$400, his payment. Should you return this check with papers to this office, please endorse it.

Very respectfully,

H. S. HOWELL.

We hereby certify that the foregoing has been compared with the records of this office and is a full, true and correct copy.

STEPHEN CARPENTER,

Register.

(Witness Continuing:) I have testified that all of



(Testimony of W. H. Hammond.)

the remainder of the timber was taken off the Edgar claim in 1886. I heard this letter read from the Register of the Helena Land Office, dated May 13, 1886, to Woody and Marshall. At the time that that timber was taken off by me, I understood that Edgar had proved up upon his claim. I knew that Edgar went with witnesses to prove up upon his claim. It was not until late in the fall of 1886 that I first learned there was a question about Mr. Edgar getting title to his property. It was after the last cutting of timber upon that claim—which timber went to the Bonner Mill, under my arrangements with Edgar—that I learned there was a question about Mr. Edgar getting title to his property. I know the Cunningham claim in section 34, township 14 north, range 14 west. That claim corners on the Edgar claim. The Cunningham claim was cut in the winter of 1892-1893. I think there was a part of that claim cut in 1891-1892 and the balance was cut in 1892-1893. No timber was cut before March 19, 1890. All the timber that I was concerned with was taken from the Cunningham claim after 1890. There was no cutting for logs upon that section which went to [407] the Bonner Mill prior to April 1, 1890. I remember the claims called the Silvey claims; I know where they are. They are *are* located in section 22, township 14 north, range 14 west. Referring to the east half of the northeast quarter of said section 22, with reference to the Silvey claim, it stands east of the Silvey claim. I know there has been cutting upon the east half of the northeast quarter. It was



(Testimony of W. H. Hammond.)

cut by Boyd in the winter of 1892-3. That was during the time of the Big Blackfoot Milling Company and at a time when I was manager of that company. At the time it was cut, the Big Blackfoot Milling Company had no title to that eighty acres of land. I do not know how Boyd come to cut it. I did not give him any directions to cut it. If it was cut by Boyd at that time, no directions, to my knowledge, were given to Boyd by anybody to cut it. My company did not own the Silvey claim at the time this cutting appears to have been done by Boyd. Boyd was cutting on the Silvey claim. I gave Boyd directions with regard to obeying the lines. If Boyd did cut over the line and cut on that eighty acres of land, he did not do so with my knowledge, approval or consent at any time. It was two years ago when I went up there, that I first knew that Boyd had cut in that eighty acres. I went up and went over the ground and I saw there was a trespass, and I spoke to Boyd about it and he claimed that he had not trespassed there. This was after this suit was brought. I did not know until this suit was brought that there had ever been any cutting there. I am familiar with the so-called Kelly claim in section 18, township 13 north, range 14 west. I first knew of that claim when I went there and estimated it before I bought it from Kelly. I went on the ground myself and estimated that land. [408] I bought the land for the Big Blackfoot Milling Company. John Cunningham was with me at the time I went upon the ground. I went over the claim and looked at the

(Testimony of W. H. Hammond.)

timber with a view of buying it. That was in the early fall of 1896. I bought the claim after I estimated it; and when I went over it the timber was there and there had been no cutting upon that property at all for logging, or any other cutting to my knowledge. I went to the lines of the claim at that time. After this claim was purchased by me for the Big Blackfoot Milling Company, it was logged that same year. It was logged the winter or fall and winter of 1896-7. I know the claim called the Tuchenhausen claim, in section 18, township 14 north, range 15 west. This claim was not cut at any time prior to July 12, 1890. The cutting was done on the Tuchenhausen claim in the winter of 1892-3. At the time that cutting was done the claim belonged to me. I purchased it from Tuchenhausen. And at the time I purchased it, I made an examination of the property. At the time I purchased it there had been no cutting upon the property other than for the improvements—his house and barn and fences. I purchased that in the summer of 1891—July 27, 1891. Neither I nor any of the corporations with which I was concerned cut off any of the timber from the Tuchenhausen claim prior to its purchase by me on July 27, 1891.

Thursday, January 23, 1913.

Defendant thereupon offered and read in evidence the petition of Blackfoot Milling and Manufacturing Company addressed to the Honorable Secretary of the Interior, dated July 8, 1891, for leave to cut timber from certain lands, which said petition is in the words and figures following: [409].

[**Exhibit—Petition, Dated July 8, 1891—Blackfoot  
Milling & Mfg. Co to Secretary of the Interior.**]

Missoula, Mont., July 8, 1891.

THE HONORABLE, Secretary of the Interior,  
Washington, D. C.

Sir:—Pursuant to the provisions of Sections Six, seven and eight, of the Department Circular, dated May 5th, 1891, prescribing rules and regulations governing the use of timber on the public domain of the United States, under the Act of March 3rd, 1891, entitled: "An Act to amend Section 8, of An Act approved March 3rd, 1891, entitled An Act to Repeal Timber Culture Laws and For Other Purposes," we very respectfully make application for the right, privilege and authority to cut and remove the pine, fir and tamarack timber from the following described public lands, to wit:

A certain piece of land described as follows: Being a piece of land one mile square on the Blackfoot River, beginning at a point four miles east of the S. E. corner of Sec. 14, Tp. 13 N. R. 19 W., said tract of land containing 640 acres, and which, when surveyed, will be Sec. 14, Tp. 13 N. R. 18 W., and having thereon about 500,000 feet of pine, fir and tamarack timber. Also that certain other tract of land being one mile square beginning at a point five miles east of the S. W. Corner of Sec. 12, Tp. 13 N. R. 19 W., said tract containing 640 acres, and which, when surveyed, will be Sec. 12, Tp. 13 N. R. 18 W., and the same having thereon about 300,000 feet of pine, fir and tamarack timber. Also that certain other tract of



land one mile square beginning at a point four miles W. from the S. W. Corner of Sec. 7, Tp. 13 N. R. 16 W., said tract containing 640 acres, and having thereon about 1,000,000 feet of pine, fir and [410] tamarack timber, and which, when surveyed, will be Sec. 8, (x) Tp. 13 N. R. 17 W. Also that certain other tract of land one mile square beginning at a

(x)  
See  
below  
duplicate point two miles W. from the S. W. corner of Sec. 7, Tp. 13 N. R. 16 W., said tract containing 640 acres, and having thereon about 1,000,000 feet of pine, fir and tamarack timber, and which, when surveyed, will be Sec. 8, (x) Tp. 13 N. R. 17 W. Also that certain other tract of

(x)  
See  
above  
duplicate land one mile square beginning at a point two miles W. from the S. W. corner of Sec. 7, Tp. 13 N. R. 16 W., containing 640 acres, and having thereon about 500,000 feet of pine, fir and tamarack timber, and which, when surveyed, will be Sec. 10, Tp. 13 N. R. 17 W. Also that certain other tract of land one mile square beginning at a point one mile W. of the S. W. corner of Sec. 6, Tp. 13 N. R. 16 W., said tract containing 640 acres, and having thereon about 2,000,000 feet of pine, fir and tamarack timber, and which, when surveyed, will be Sec. 2, Tp. 13 N. R. 17 W. Also that certain other tract of land one mile square beginning at a point one mile W. from the S. W. corner of Sec. 30, Tp. 14 N. R. 16 W., containing 640 acres, and having thereon about 2,000,000 feet of pine, fir and tamarack timber, and which, when surveyed, will be Sec. 26, Tp. 14 N. R. 17 W. Also that certain other tract of land one mile square beginning at the S. W. corner of Sec.



19, Tp. 14 N. R. 14 W., said tract containing 640 acres, and which, when surveyed, will be Sec. 24, Tp. 14 N. R. 17 W., and having thereon about 2,000,000 feet of pine, fir and tamarack timber. Also that certain other tract of land one mile square beginning at the S. W. corner of Sec. 7, Tp. 13 N. R. 16 W., said tract containing 640 acres, and which, when surveyed, will be Sec. 12, Tp. 13 N. R. 17 W., and having thereon [411] about 2,500,000 feet of pine, fir and tamarack timber. Also the N. W. quarter of Sec. 6, Tp. 13 N. R. 16 W., containing 160 acres, and having thereon about 1,000,000 feet of pine, fir and tamarack timber. Also E. half of Sec. 32, Tp. 14 N. R. 16 W., containing 320 acres, and having thereon about 1,000,000 feet of pine, fir and tamarack timber. Also the S. E. quarter of Sec. 28, Tp. 14 N. R. 16 W., containing 160 acres, and having thereon about 750,000 feet of pine, fir and tamarack timber. Also Sec. 20, Tp. 14 N. R. 16 W., containing 640 acres, and having thereon about 500,000 feet of pine, fir and tamarack timber. Also Sec. 22, Tp. 14 N. R. 16 W., containing 640 acres, and having thereon about 500,000 feet of pine, fir and tamarack timber. Also the S. half and the S. half of the N. W. quarter and the N. W. quarter of the N. W. quarter, and the S. W. quarter of the N. E. quarter of Sec. 26, Tp. 13 N. R. 14 W., containing 480 acres, and having thereon about 1,000,000 feet of pine, fir and tamarack timber. Also the north half and the east half of the S. E. quarter, and the S. W. quarter of the S. E. quarter, and the S. E. quarter of the S. W. quarter of Sec. 24, Tp. 14 N. R. 16 W., containing 480 acres, and having thereon

about 1,000,000 feet of pine, fir and tamarack timber. Also Sec. 14, Tp. 14 N. R. 16 W., containing 640 acres, and having thereon about 500,000 feet of pine, fir and tamarack timber. Also, all of Sec. 18, except the S. E. quarter, Tp. 14 N. R. 15 W., said tract containing 480 acres, and having thereon about 750,000 feet of pine, fir and tamarack timber. Also all of Sec. 20, except the N. half of the N. E. quarter and N. half of N. W. quarter, Tp. 14 N. R. 15 W., containing 480 acres, and having thereon about 250,000 feet of pine, fir and tamarack timber. Also Sec. 8, [412] Tp. 14 N. R. 15 W., containing 640 acres, and having thereon about 100,000 feet of pine, fir and tamarack timber. Also Sec. 22, Tp. 14 N. R. 15 W., containing 640 acres, and having thereon about 500,000 feet of pine, fir and tamarack timber. Also Sec. 28, Tp. 14 N. R. 15 W., containing 640 acres and having thereon about 250,000 feet of pine, fir and tamarack timber. Also Sec. 34, Tp. 14 N. R. 15 W., containing 640 acres and having thereon about 1,200,000 feet of pine, fir and tamarack timber. Also Sec. 2, Tp. 13 N. R. 15 W., containing 640 acres, and having thereon about 1,000,000 feet of pine, fir and tamarack timber. Also Sec. 12, Tp. 13 N. R. 15 W., containing 640 acres, and having thereon about 300,000 feet of pine, fir and tamarack timber. Also Sec. 8, Tp. 14 N. R. 14 W., containing 640 acres, and having thereon about 1,000,000 feet of pine, fir and tamarack timber. Also Sec. 6, Tp. 14 N. R. 14 W., containing 640 acres, and having thereon about 1,000,000 feet of pine, fir and tamarack timber. Also Sec. 30, Tp. 15 N. R. 14 W., containing 640 acres, and

having thereon about 1,500,000 feet of pine, fir and tamarack timber. Also Sec. 2, Tp. 14 N. R. 14 W.,

#Duplicate. See next page.

containing 640 acres, and having thereon about 500,000 feet of pine, fir and tamarack timber. Also Sec. 34, Tp. 14 N. R. 14 W., containing 640 acres, and having thereon about 1,500,000 feet of pine, fir and tamarack timber. Also Sec. 26, Tp. 14 N. R. 14 W., containing 640 acres, and having thereon about 1,000,000 feet of pine, fir and tamarack timber.

#Duplicate. See next page.

Also Sec. 10, Tp. 14 N. R. 14 W., containing 640 acres, and having thereon about 1,000,000 feet of pine, fir and tamarack timber. Also Sec. 14, Tp. 14 N. R. 14 W., containing 640 acres, and having thereon about 1,000,000 feet of pine, fir and tamarack timber. Also Sec. 6, Tp. 13 N. R. 14 W., containing 640 acres, [413] and having thereon about 1,500,000 feet of pine, fir and tamarack timber. Also Sec. 18, Tp. 15 N. R. 14 W., containing 640 acres, and having thereon about 2,000,000 feet of pine, fir and tamarack timber.

Also Sec. 4, Tp. 13 N. R. 14 W., containing 640 acres, and having thereon about 2,000,000 feet of

#Duplicate. See below.

pine, fir and tamarack timber. Also Sec. 30, Tp. 15 N. R. 13 W., containing 640 acres, and having thereon about 300,000 feet of pine, fir and tamarack timber.

#Duplicate. See below.

Also Sec. 32, Tp. 15 N. R. 13 W., containing 640 acres, and having thereon about 400,000 feet of pine, fir and tamarack timber. Also Sec. 8, Tp. 15 N. R. 12 W., containing 640 acres, and having thereon about 2,000,000 feet of pine, fir and tamarack timber.



Also Sec. 4, Tp. 15 N. R. 12 W., containing 640 acres, and having thereon about 1,000,000 feet of pine, fir

#Duplicate. See previous page.

and tamarack timber. Also Sec. 10, Tp. 14 N. R. 14 W., containing 640 acres, and having thereon about 300,000 feet of pine, fir and tamarack timber.

#Duplicate. See previous page.

Also Sec. 2, Tp. 14 N. R. 14 W., containing 640 acres, and having thereon about 500,000 feet of pine, fir and

#Duplicate. See above.

tamarack timber. Also Sec. 30, Tp. 15 N. R. 13 W., containing 640 acres, and having thereon about 300,000 feet of pine, fir and tamarack timber. Also

#Duplicate. See above.

Sec. 32, Tp. 15 N. R. 13 W., containing 640 acres, and having thereon about 400,000 feet of pine, fir and tamarack timber. Also Sec. 2, Tp. 15 N. R. 12 W., containing 640 acres, and having thereon about 2,000,000 feet of pine, fir and tamarack timber. Also Sec. 20, Tp. 15 N. R. 13 W., containing 640 acres, and having thereon about 500,000 feet of pine, fir and tamarack timber. Also Sec. 28, Tp. 14 N. R. 12 W., containing 640 acres, and having thereon about 1,500,000 feet of pine, fir and tamarack timber. Also Sec. 34, Tp. 14 N. R. 12 W., containing 640 [414] acres, and having thereon about 800,000 feet of pine, fir and tamarack timber. Also Sec. 30, Tp. 15 N. R. 11 W., containing 640 acres, and having thereon about 1,500,000 feet of pine, fir and tamarack timber. Also Sec. 20, Tp. 15 N. R. 11 W., containing 640 acres, and having thereon about 300,000 feet of pine, fir and tamarack timber, situated in the counties of Missoula and Deer Lodge, in the State of Montana.



The lands above described are non-mineral in character and most of them will be valuable for settlement of agricultural and grazing purposes when the timber is removed.

The timber now growing on said lands comprises pine, fir and tamarack, in nearly or about equal proportions, of which it is the purpose and desire of the applicant to cut and remove only the merchantable saw log pine, fir and tamarack, leaving all trees under twelve inches in diameter for use of the settlers for fire wood, fences and other necessary purposes. The purpose for which the timber to be taken by applicant is required, is for the manufacture of the same into lumber laths, &c., and such other timber products as may be necessary for the encouragement of settlement and the development of the natural resources of the State of Montana, and I, the said applicant, here agree that all of said timber and its products shall be utilized for the purpose named, and none of it shall be exported or transported out of the State of Montana, and such special restrictions as may be prescribed by the Department confining the use of the timber for the public good in this state will be strictly and fully complied with. The lands described in the application are not situated at the head-waters of streams in sections where it would be desirable that the timber thereon should be reserved [415] for climatic or economic reasons or for the public good, but, on the contrary, the use of the timber is a public necessity, in corroboration of which I transmit herewith affidavits of *bona fide* settlers

who reside within the limits of the lands described in the application.

Very respectfully,  
BLACKFOOT MILLING & MFG. CO.,  
By THOS. C. MARSHALL,  
Vice-President.

State of Montana,  
County of Missoula,—ss.

Thos. C. Marshall, being duly sworn, on his oath deposes and says that the applicant mentioned and described in the accompanying affidavits, and who signed the foregoing application, is a corporation, duly organized and existing under the laws of Montana, organized for doing the business of manufacturing lumber, laths, etc., for the use of the settlers and citizens of the State of Montana in the necessary building and development of the natural resources of said State; that this applicant is an officer thereof, to wit, Vice-President, that he knows the contents of the foregoing application and that the same is true to the best of his knowledge, information and belief.

[Seal] THOS. C. MARSHALL.

Subscribed and sworn to before me this the eighth day of July, 1891.

GUST. MOSER,  
Notary Public.

State of Montana,  
County of Missoula,—ss.

H. W. Harrison, S. H. Newport, P. Demrous and Milton Hammond, being duly sworn, on their oaths depose and say that they [416] are acquainted with the contents of the foregoing application of the

Blackfoot Milling & Manufacturing Co., and know the lands therein described, that the statements contained in the said application, affidavits, etc., are personally known to those affiants and are true.

H. W. HARRISON.

S. H. NEWPORT.

P. DEMROUS.

MILTON HAMMOND.

Subscribed and sworn to before me this the ninth day of July, 1891.

[Seal]

GUST. MOSER,

Notary Public.

[Endorsed]: 11,686. Department of the Interior. L. & R. R. Div., Receiver. Dec. 14, 1891. A. Application. 1891. 92824. 2.

Defendant thereupon offered and read in evidence the amended petition of Blackfoot Milling and Manufacturing Company addressed to Honorable Secretary of the Interior, dated September 23, 1891, for leave to cut timber from certain lands, which said amended petition is in the words and figures following, to wit:

**[Exhibit—Amended Petition Dated September 23, 1891, of Blackfoot Milling & Manufacturing Co. to Secretary of Interior.]**

Missoula, Montana, September 23d, 1891.

HONORABLE SECRETARY OF THE INTERIOR,  
Washington, D. C.

SIR: Referring to our letter of July 8th, 1891, making application for a permit to cut timber from certain described [417] public lands in Missoula and



Deer Lodge counties, this state; we respectfully request permission to amend and modify our said application by eliminating therefrom the following lands described therein: viz., NW.  $\frac{1}{4}$ , Sec. 34, Tp. 14 N., R. 14 W., the same being covered by C. E. 4489 of Elijah F. Cunningham; All of Sec. 20, Tp. 15 N. R. 13 W., the same being covered by homestead entries of Jas. Burk, Ralph C. Davis, John T. Evans and Michael Delaney: All of Secs. 30 and 32, Tp. 15 N., R. 13 W., as we are advised that one C. E. Woodworth, who owns a small sawmill located on Sec. 32, desires to procure permission to cut timber from said sections for use of the settlers in that immediate vicinity, and we have no desire to interpose any obstacle which may interfere with his enterprise or in any way incommode the settlers and residents in that locality: W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 34, Tp. 14 N., R. 12 W., the same being covered by homestead entry of Hugh J. Wates: All of Secs. 20 and 30, Tp. 15 N., R. 11 W. (unsurveyed), being informed that A. J. Kleinen and William Ohnesorge, respectfully, claim to have settled thereon in good faith for the purpose of acquiring homes, and we have no desire to take any action which may interfere with or be detrimental to the interests of a *bona fide* settler.

We further request that action upon our application for permission to cut timber from the W.  $\frac{1}{2}$ , Sec. 8, and all of Sec. 6, Tp. 14 N. R. 14 W., and Sec. 30, Tp. 15 N., R. 14 W., be suspended pending consideration and action upon the application of Hiram S. Blanchard to cut timber therefrom, he claiming



to own a small saw mill in that vicinity. Although Mr. Blanchard did not publish notice of his intention to apply for such permit until over a month subsequent to the published [418] notice of our Company, we have no desire to throw any obstacles in his way, nor to object to the permit being applied for being granted him, should you deem it advisable and necessary in the interests of the public or settlers in the vicinity of said lands. Should, however, his application for permission to cut timber from said lands, or any portion thereof, be refused or rejected, we respectfully request that our application shall again apply and be taken up for action.

#### RECAPITULATION.

Lands to be eliminated from our application:

NW.  $\frac{1}{4}$ , Sec. 34, Tp. 14 N., R. 14 W., containing 400,000 ft.,

All of Sec. 20, Tp. 15 N., R. 13 W., containing 500,000 ft.,

All of Sec. 30, Tp. 15 N., R. 13 W., containing 300,000 ft.,

All of Sec. 32, Tp. 15 N., R. 13 W., containing 400,000 ft.,

W  $\frac{1}{2}$ , SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , Sec. 34, Tp. 14 N., R. 12 W., containing 200,000 ft.,

All of Sec. 20, Tp. 15 N., R. 11 W., containing 300,000 ft.,

All of Sec 30, Tp. 15 N., R. 11 W., containing 1,500,000 ft.

Lands upon which action upon application is to be suspended:

W. 1/2, Sec. 8, Tp. 14 N., R. 14 W., containing 500,000 ft.,

All of Sec. 6, Tp. 14 N., R 14 W., containing 1,000,000 ft.,

All of Sec. 30, Tp. 15 N., R. 14 W, containing 1,500,000 ft.

Making a total of eight sections containing 6,600,000 ft. of timber.

Very respectfully,  
BLACKFOOT MILLING & MFG. CO.,  
By THOMAS C. MARSHALL, V. P.

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[Endorsed]: 19/397. 9352. General Land Office, 1891, Sep. 30, Receiver, 118397.

BLACKFOOT MILLING & MFG. CO.

Missoula, Mont., Sept. 23, 91.

Ask the elimination of tracts named from their application for [419] permission to cut and remove timber from public lands, etc.

Case 31/61. P. Jecko. Ack. 2. A. M. Sept. 28/91. E. M. Dawson. General Land Office, Division 1, Sep. 30, 1891.

Defendant thereupon offered and read in evidence permit to cut public timber, issued by the Secretary of the Interior to the Blackfoot Milling and Manufacturing Company, which said permit is in the words and figures following, to wit:

**[Exhibit—Permit to Cut Public Timber, Secretary  
of the Interior to Blackfoot Milling & Manu-  
facturing Co.]**

M. L. 244762-1.

PERMIT TO CUT PUBLIC TIMBER.

UNITED STATES OF AMERICA.

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

WHEREAS, in conformity with the provisions of an act of Congress, approved March 3, 1891, entitled "An act to amend section eight of an act approved March third, eighteen hundred and ninety-one, entitled 'An act to repeal timber-culture laws and for other purposes,' " and rules and regulations promulgated by the Secretary of the Interior for the execution of said act, The Blackfoot Milling and Manufacturing Company of Missoula, Montana, has made application to cut and remove timber from a portion of the public lands, fully and specifically in said application described, for necessary agricultural and mining purposes and for manufacturing lumber for domestic uses,

AND WHEREAS, it is deemed necessary for the public interest that permission be granted unto the said The Blackfoot Milling and Manufacturing Company to cut timber on the lands hereinafter described;

THEREFORE, under and by virtue of the authority vested by law in the Secretary of the Interior, and [420] subject to all the conditions, restrictions, obligations, and limitations herein contained,

permission is hereby granted unto the said The Blackfoot Milling and Manufacturing Company to cut timber on the public lands for immediate use in the state of Montana, which said timber may be cut on public lands in the counties of Deer Lodge and Missoula in said state of Montana within limits particularly described as follows, to wit: The whole of Section Ten (10), Township Fifteen (15) North, Range Fourteen (14) West; the whole of Section Ten (10) and the East half and the Southwest quarter of Section thirty-four (34), Township Fourteen (14) North, Range Fourteen (14) West; the South half of Section Eight (8), the North half of the South West quarter of Section Eighteen (18), the West half and the South East quarter of Section Twenty-eight (28), and the whole of Section Thirty-four (34), Township Fourteen (14) North, Range Fifteen (15) West; the North West quarter of Section Six (6), Township Thirteen (13) North, Range Sixteen (16) West; the North half, the East half of the South East quarter, the South West quarter of the South East quarter and the South East quarter of the South West quarter of Section Twenty-four (24), the East half of Section Fourteen (14), the East half of Section Thirty-two (32), and the whole of Sections Twenty (20) and Twenty-two (22), Township Fourteen (14) North, Range Sixteen (16) West. And from the following unsurveyed public land, which when surveyed will be the whole of Sections Six (6) and Twenty-six (26), Township Thirteen (13) North, Range Fourteen (14) West; the whole of Sections Two (2) and Twelve (12), Township Thir-



teen (13) North, Range Fifteen (15) West; the whole of Section Two (2); the South half of Section Eight (8) and the North half of Section Ten (10), Township Thirteen (13) North, Range Seventeen (17) West; the whole of [421] Section Twenty-six (26), Township Fourteen (14) North, Range Seventeen (17) West; and the whole of Section Twelve (12) and the North half of Section Fourteen (14), Township Thirteen (13) North, Range Eighteen (18) West, as more specifically described by metes and bounds in its application, embracing in all eleven thousand two hundred and eighty (11,280) acres.

PROVIDED, HOWEVER, it is expressly stipulated and agreed that the permit hereby granted shall be, and the same is hereby, made subject to the following conditions, restrictions and limitations, to wit:

1. That this permit and all rights and privileges hereunder shall expire on the thirty-first day of January, 1893.
2. That no trees shall be cut or removed that are less than twelve inches in diameter, except such as may be absolutely necessary for making needed roadways through the timber.
3. That in the cutting of timber in the manner and for the purpose set out in the application of said The Blackfoot Milling and Manufacturing Company not to exceed fifty per cent of the timber of each class now growing thereon, and taken as nearly as may be from each acre of the tracts above described, shall be taken from the lands embraced in this permit.
4. That the said The Blackfoot Milling and Man-

ufacturing Company shall submit monthly, through the Register and Receiver at Missoula, Montana, a statement, under oath, showing the amount of each kind or kinds of timber cut or removed during each month, giving a description of the particular tract or tracts from which such timber was cut, and stating how such timber was disposed of and to whom.

5. That no timber cut or removed under this permit shall be so cut or removed for transportation out of the State of [422] Montana.

6. That in acting under this permit, no timber is to be cut or removed from any tract or tracts covered by the settlement or occupation of any *bona fide* settler, intending to perfect title to such tract or tracts under any of the laws of the United States, nor from any tract or tracts embraced in any reservation of whatsoever kind, created by operation of law or proclamation of the President.

7. That all of each tree cut that can be profitably utilized shall be used, and that the said The Blackfoot Milling and Manufacturing Company shall cut, remove, burn, or otherwise safely dispose of the tops and brush of trees, and the tails, slabs, saw-dust and other refuse from its sawmills, with a view to preventing the same remaining food for flames, and that the said The Blackfoot Milling and Manufacturing Company stands liable in damages for the starting or the spread of any fires attributable to its neglect or that of its employees in any manner to comply strictly with this provision.

8. That during the continuance of this permit the said The Blackfoot Milling and Manufacturing

(Testimony of W. H. Hammond.)

Company agrees not to purchase timber cut on public land of the United States of any person, or persons, not having a permit from this Department to cut timber from said public lands, except as provided in section 4 of the Circular of May 4, 1891, and it further agrees to ascertain affirmatively that persons offering timber for sale have the necessary permit to cut the same if taken from the public lands.

9. That nothing in this permit shall be construed to give to the said The Blackfoot Milling and Manufacturing Company the exclusive right to cut or remove timber from the [423] lands described herein, nor shall the granting of this permit in any way be held to withdraw the lands embraced herein from settlement or occupation and entry by any qualified *bona fide* claimant.

10. That the right is hereby reserved to modify or revoke at any time the permission hereby granted.

11. That the said The Blackfoot Milling and Manufacturing Company shall be subject to all the rules and regulations under the said act of March 3, 1891, as well as the conditions, restrictions, and limitations herein set forth and such additional rules and regulations as may hereafter be promulgated.

12. In consideration of the granting of this permit, it is expressly stipulated and agreed that the said The Blackfoot Milling and Manufacturing Company will use all available means to prevent forest fires, and should such fires be started, to endeavor to extinguish the same within the limits herein described.



13. That this permit is not transferable and any attempt to transfer the same will render it void.

THOS. H. CARTER,

Commissioner of the General Land Office.

APPROVED: January 16th, 1892.

JOHN W. NOBLE,

Secretary of the Interior.

[Endorsed]: U. S. Land Office, Missoula, Mont. Filed May 19th, 1892. Robert Fisher, Register. Received at the office June 5th, 1893. Robert Fisher, Register. 1890. 62027. [424]

Department of the Interior, General Land Office. Permit to Cut timber on Non-mineral Public Land. Granted to the Blackfoot Milling and Manufacturing Company of Missoula in the County of Missoula in the State of Montana. M. L. 244762-3. [425]

Defendant thereupon offered and read in evidence a letter dated May 14, 1892, on the letter-head of the Department of the Interior, Washington, D. C., which said letter is in the words and figures following, to wit:

**[Exhibit—Letter, Dated May 14, 1892, Thomas H. Carter, Commissioner, to Register and Receiver.]**

Register and Receiver, Missoula, Montana.

Gentlemen: I enclose herewith a letter addressed to you under date of March 12, 1892, which was referred to the Department for consideration and concurrence, and has just been returned to this office approved by the Hon. Secretary on the 10th inst.

In accordance with said letter, all of the rights and privileges conferred in the permit to cut public



timber granted to the Blackfoot Milling & Manufacturing Company, now attach to the Big Blackfoot Milling Company, as fully as though the permission was issued in its name; provided, the Big Blackfoot Milling Company endorse upon the receipt given by the Blackfoot Milling & Manufacturing Company for the permit issued in its name, its acceptance of the conditions, restrictions, etc., contained in the permit, and agree to strictly and faithfully comply with the same.

You will advise the Big Blackfoot Milling Company of the contents hereof, and upon its compliance with the requirements herein, will deliver to said company the permit granted to the Blackfoot Milling and Manufacturing Company returned herewith [426] for that purpose.

Very respectfully,

THOMAS H. CARTER,

Commissioner.

Defendant thereupon offered and read in evidence a receipt from the Blackfoot Milling and Manufacturing Company and the Big Blackfoot Milling Company, which said receipt is in the words and figures following, to wit:

**[Receipt, Dated February 12, 1892, Blackfoot Milling & Manufacturing Co. et al. to Register.]**

Missoula, Montana, Feby. 12, 1892.

Received from Robert Fisher, Register of the land office at Missoula, Montana, a permit to cut timber on certain described non-mineral public lands, issued and approved by the Honorable Secretary of the

(Testimony of W. H. Hammond.)

Interior, January 16, 1892, under and by virtue of the authority vested in him by Act of Congress approved March 3, 1891. (26 Stats., p. 1093).

Said permit is accepted upon the conditions, restrictions and limitations therein stated, which we hereby agree to and strictly and faithfully comply with in every particular.

THE BLACKFOOT MILLING & MANUFACTURING COMPANY,

By THOS. C. MARSHALL,  
Vice-President.

BIG BLACKFOOT MILLING COMPANY,

By THOS. C. MARSHALL,  
Attorney.

This May 20, 1892.

[Endorsed]: Filed February 12, 1892. Robert Fisher, Register. [427]

(Witness Continuing:) At the time cutting was done west of the Tuchenhausen claim, on section 18, it was done by the Big Blackfoot Milling Company; at the time it was done I did not know that the cutting was being done on the forty acres that makes what might be called the south half of the southwest quarter. I first learned that it had been cut over two years ago when I visited this land, which was subsequent to the bringing of this action. There is a difference in the appearance of land after the same has been cut under a permit to cut public timber and when the timber has been cut upon land owned by the company. Where cut under a permit, there is a lot

(Testimony of W. H. Hammond.)

Milling and Manufacturing Company, I owned teams and logging equipment. But on the sale of the mill and property to the Blackfoot Milling and Manufacturing Company I retained my teams and logging equipment; I also retained the logs that I had on the banks of the Blackfoot River. I had seventy-five or eighty teams with their equipment which I retained at the time of that transfer. No other person had any interest with me in the teams that I retained. I continued to operate those teams and logging equipment from that time forward there on the Blackfoot. Ultimately I went into the contracting business, and as I did, I sold my teams off gradually. When I gave a man a contract to procure logs for me, probably I would sell him some of my teams and equipment. I never sold any of these teams to the Blackfoot Milling and Manufacturing Company. I don't remember whether the Big Blackfoot Milling Company took over any of my teams or not; I had very few teams; I had gone out of logging and was letting contracts for logs. In the meantime, the teams that I had parted with had not to my knowledge been disposed of to either of those corporations. Most of those teams were sold to different individuals. When those teams were sold, the profit came to me; neither A. B. Hammond nor the Missoula Mercantile Company shared with me in those profits; the Blackfoot Milling and Manufacturing Company did not furnish me with any teams during the period of time that I was logging from the beginning of my operations on the Black-



(Testimony of W. H. Hammond.)

foot down to the time of the transfer to the Big Blackfoot Milling Company; the Blackfoot Milling and Manufacturing Company never engaged in logging on the Blackfoot River during [430] the time of its existence.

Cross-examination.

I was born in New Brunswick, Canada. I am a brother of the defendant, A. B. Hammond. I came to the State of Montana in 1881; my brother had preceded me there; he was already in business when I arrived. My first employment was the building of a wagon road for the Northern Pacific. I was employed by the Northern Pacific to build the road. Mr. Weeks, the division engineer of the Northern Pacific Railroad employed me. I don't think my brother, A. B. Hammond introduced me to Mr. Weeks. My first lumbering business in Montana was cutting ties and piling for the Northern Pacific. I did that work for E. L. Bonner & Company, which was the firm in which my brother, A. B. Hammond was interested. I continued this work for E. L. Bonner & Company for about two years. I had a contract with E. L. Bonner & Company and commenced work in the fall of 1881, and continued for two years. I did not work anywhere for quite a period of time—until the latter part of 1883. My next connection with the lumber business was working for a short period of time for the Montana Improvement Company; I commenced work for them along in the latter part of 1884. I had charge of operating some mills and cutting some logs for the



(Testimony of W. H. Hammond.)

up of some of their mills there. I was sort of a general factotum in that vicinity looking after the remnants of the old Montana Improvement Company's business. As to whether the two companies known as the Blackfoot Milling and Manufacturing Company and the Big Blackfoot Milling Company were identical, some of the same stockholders were in both companies; there was a change of name and a change of stock; there was no material difference in the identity of the corporations. The idea was to change the name and to change the character of the stock. The Blackfoot Milling and Manufacturing Company had just one kind of stock and the Big Blackfoot Milling Company had first and second preferred stock and common stock. I don't know whether it would have been feasible under the law to change the character of stock in the old company. I suppose the board of directors supervised the changing of the one company to the other and I guess I did. I was a member of the board of directors. I don't remember whether I was a member of the board of directors at that time. I think Mr. Bonner and Mr. A. B. Hammond were members of the Big Blackfoot Milling [433] Company immediately after it came into existence. Colonel Eddy was a stockholder in the Big Blackfoot Milling Company. I think Mr. A. B. Hammond continued as one of the directors of the Big Blackfoot Milling Company until the time he and his associates disposed of their stock to Mr. Daly. I believe Mr. Hammond was appointed sole trustee for all of the stock of the Big

(Testimony of W. H. Hammond.)

Blackfoot Milling Company to negotiate a transfer of his interest and the interest of his associates over to Mr. Daly. He did not altogether alone conduct the negotiations. I had something to do with that. Mr. A. B. Hammond and Mr. Hathaway had something to say about it. Mr. A. B. Hammond acted as trustee for the transfer of that stock. The flour mill we ran at Bonner belonged to the company and the merchandise store belonged to the company. I went up the Blackfoot River in 1883, but I went up there and established that headquarters camp for the purpose of carrying on logging operations in 1885. In 1883 I went on a hunting trip and general looking around over the country, a sort of scouting trip for my own individual purposes. I did not take a trip up the Blackfoot River country for the Montana Improvement Company for the purpose of looking over the situation and seeing whether or not there were logging propositions there; I never did. My first trip up there in regard to logging was in the fall of 1885 when the Fish Creek or Headquarters Camp was established. George L. Hammond, my brother, had charge of that camp, and he continued in charge of it during the time it was in existence; all the time. Jack Cunningham was foreman there under George Hammond. George Hammond was my agent there looking after timber on the Blackfoot and these foremen were under him at these different camps. From the time I first established the Headquarters [434] Camp in 1885 until we sold out there, I used to go up and down

(Testimony of W. H. Hammond.)

had anything to do with on the Edgar claim was in 1886. He resided there on the claim for two or three years after that. I was on the Tuchenhausen claim last summer. I don't know whether there was much difference in the character of the growth and the conditions of the old stumps between the old Tuchenhausen claim and the lands lying to the [436] west. A fire ran over the Tuchenhausen claim and I don't think it had run over the other. The Tuchenhausen claim was cut clean. I did not examine the stumps on the Tuchenhausen claim.

**Redirect Examination.**

The town of Bonner had a population of probably three hundred and fifty or four hundred when the property was sold out there. There are farms up the Blackfoot River to-day. The State of Montana owns this Edgar claim to-day.

Q. Have you made any inquiries as to what price the State is holding that land at?

Objected to by the plaintiff on the ground that it is immaterial.

Mr. WHEELER.—I wish to show that the State now holds that land as agricultural land and that it is held to-day at \$10.00 per acre.

Objection sustained by the Court; to which ruling of the Court, defendant duly excepted.

**Defendant's Exception No. 10.**

(Witness Continuing:) I have had some experience in farming. I have had some experience in farming in parts of Montana. I am a fair judge of



(Testimony of W. H. Hammond.)

farming land. As to the quality of the land upon this Edgar claim regarding its fitness for a farm, I should judge it was good, fair farming land. I have seen a good many farms on a great deal worse land than what that is—a great many. I was born in New Brunswick, right on the United States line. The St. John's River was the line. My father's brother lived right across the river in the State of Maine. I first came to the United States, to make it my [437] home in 1867. I declared my intention to become a citizen of the United States in the Territory of Washington, Puget Sound, in 1878. Before I went to Montana in 1881, I had been in business in the Territory of Washington, Puget Sound. I was in the logging and teaming business. I had had experience in the logging and teaming business. I worked in the woods when I was fifteen or sixteen years old. When I was conducting business in the Territory of Washington, Mr. A. B. Hammond, my brother, had nothing whatever to do with it. I had no interest in common with my brother at any time prior to my arrival in Montana. I was operating on my own account, while I was engaged in the logging business in the Territory of Washington. I had not owned any sawmill. I would cut logs and sell them to whoever wanted to buy them. While logging in Washington, I purchased merchandise at stores.

Q. State what the custom was of extending credit and paying orders.

Mr. HALL.—To which the plaintiff objects on the



(Testimony of W. H. Hammond.)

ground that it is irrelevant, incompetent and immaterial as to any custom that existed in some other State at a time prior to the time in question.

Mr. WHEELER.—I think, your Honor, where circumstances are relied upon to point to something wrong, that we are entitled to show that what was done in the matter of these credits in Montana was exactly the way that business was conducted elsewhere by mercantile concerns, with which it is not possible that A. B. Hammond or any of the firm of Eddy-Hammond and Company or the Missoula Mercantile Company had any connection whatever. I want to show that he got credit from strangers before he went to Montana. The implication here [438] is that this man could not have done any business unless he had been given credit by his brother, A. B. Hammond. We wish to show that he transacted business with strangers in just that same way.

Objection sustained by the court; to which ruling defendant duly excepted.

#### **Defendant's Exception No. 11.**

Q. Mr. Hammond, state whether or not while engaged in the logging business in the state of Washington, you obtained credit from any mercantile concern.

The COURT.—I have ruled on that and it is not necessary for you to multiply questions in order to save a ruling on any particular matter. You have your exception, and that answers every purpose.

Mr. WHEELER.—I am asking him if he obtained

(Testimony of W. H. Hammond.)

credit. That is a little different question. I have the same ruling and exception here.

**Defendant's Exception No. 12.**

Q. State whether or not while in business in Washington it was your custom to give orders upon any mercantile house in payment of your men.

To which question plaintiff objected on the ground that it is irrelevant, incompetent and immaterial as to any custom that existed in some other state at a time prior to the time in question.

The objection was sustained by the Court; to which ruling defendant duly excepted.

**Defendant's Exception No. 13.**

(Witness Continuing:) From my experience in the woods and logging matters, regarding the possibility of telling by examining a stump whether same had been cut five years or longer, by the appearance [439] of the stump, you might tell five years, but I do not think that after ten years you could tell whether a stump was cut ten years ago or fifteen years ago—not with any definiteness. I know there was cutting along the Blackfoot River on lands involved in this suit for railroad timber and for ties prior to 1885. There was a man by the name of Sloan who had a contract for ties and piling in 1882 and he cut from the Bonner mill up as far as Montour Creek. That was all along the river, ties and piling were cut down to the Clearwater River. He cut a lot of ties out of that Longley Flat, as you call it, and he cut a lot of ties on both sides of the river on section 26, township 14 north, range 16 west.

(Testimony of W. H. Hammond.)

When the transfer took place from the Blackfoot Milling and Manufacturing Company to the Big Blackfoot Milling Company, most of the old stockholders took stock. I believe there were some new men that came in at that time. With regard to the stockholders before and after the transfer, as far as I know, they were as follows: E. L. Bonner, R. A. Eddy, A. B. Hammond, George Hammond, C. H. McLeod, John M. Keith, Thomas Marshall, a man by the name of Dawes and I think Haycock had some stock. The Blackfoot Milling and Manufacturing Company was not the same thing as the Eddy-Hammond & Company in corporate form. I don't think Mr. Thomas Marshall, the attorney, had a large interest. I could not say how much he had. Mr. John M. Keith had thirty, forty or fifty shares of the first stock. When we sold out I received something over two hundred and fifty thousand dollars, as near as I can remember, for my shares. Mr. A. B. Hammond had no interest in, nor did he receive, a part or portion of the \$250,000, or thereabouts, that I received for my interest. I was residing in California when this suit was brought. [440] I have been making my home here in California since 1899. I do not know how much Mr. Eddy received in that same transaction. My recollection is that Mr. Eddy owned first preferred stock. He resides in Europe most of the time, I guess; he resides in San Francisco, that is, makes his home in San Francisco, but I guess he is away most of the time in Europe, a great deal of his time. Mr. Eddy



(Testimony of W. H. Hammond.)

is a man of large means. The lumber that I cut at this mill was bought by the Anaconda Mining Company in Montana. In the early operations most of it went to the Anaconda Mining Company. Mr. Daly, of the Anaconda Mining Company, furnished me with capital for the operation of my mill; at various times \$50,000. A man by the name of Walker loaned me money—I think I had a loan of \$50,000, from him. Prior to the incorporation of the Big Blackfoot Milling Company, all of the lumber that was cut by me or under my directions was used in the mines at Butte and the smelters.

The COURT.—He said that yesterday. He said that his lumber was sold largely, if not entirely, to people in Missoula and that some of it also went to the Anaconda Mining Company.

Mr. WHEELER.—I think he said “largely,” your Honor. My purpose is to show that all of the lumber he manufactured was used in the State of Montana. A special statute gives us that defense.

(Witness Continuing:) As to the purposes for which the lumber manufactured at Bonner was used; it was used in the mines as timber, planking and logging, and building material for building smelters, etc. We cut fences for agricultural use and flooring [441] of all kinds and material that was used for the construction of houses.

Q. State whether or not, so far as you know, the entire lumber manufactured at Bonner was used in the State of Montana for one of the following purposes: Mining, agriculture, manufacturing or timber purposes.



(Testimony of W. H. Hammond.)

A. The main part of our lumber that was manufactured there was used for that purpose.

Q. Do you know of any that was used for other purposes?

A. We sold some lumber to the railroad company.

(Witness Continuing:) The lumber that was sold to the railroad company was used for ties and bridges; and for all these purposes the lumber manufactured was used in Montana. It is not possible to tell what became of the lumber that was manufactured from logs cut off any particular place, such as off section 18, which we have called the Boyd trespass, or off the Edgar claim; they were put in the river and went down with the other logs and were sawed in the mill and shipped. I could not tell where each and every log went to, its final destination. I testified on my cross-examination that I was still employed by the Montana Improvement Company after I bought out its holdings at Bonner. I was employed to look after their mill at Wallace. Wallace and Bonner are not the same place. I never worked for the Montana Improvement Company at Bonner at any time and I did nothing for the Montana Improvement Company at Bonner after I made the purchase of the Bonner property evidenced by the deed here in evidence reciting a consideration of \$300.00. I continued in the employ of the Montana Improvement Company in [442] the fall of 1885 and a little while the first part of the winter of 1886. About that time I was living with my sister at Wallace, then I went to Bonner and resided there from

(Testimony of W. H. Hammond.)

that time forward until we sold out in 1898. I continued to stay there until the beginning of 1899.

[443]

Defendant thereupon offered in evidence a certified copy of part of the duplicate assessment book of the County of Missoula for the year 1886, setting forth assessment of W. H. Hammond, Missoula, for said year, from which said copy of said part of said duplicate assessment book it appeared that W. H. Hammond was assessed in the sum of \$2,000.00 for merchandise; that the amount of his capital was \$12,000.00; his horses \$600.00; 3 wagons \$100.00; and a sawmill \$10,000.00. Total assessment, \$24,720. The document was marked Defendant's Exhibit "D."

Defendant thereupon offered in evidence a certified copy of part of the duplicate assessment book of the County of Missoula for the year 1887, setting forth assessment of W. H. Hammond for said year, from which it appeared that the value of stock was \$2,500.00; the amount of capital \$22,000.00; 16 horses \$1,600.00; 4 mules \$400.00; 14 oxen \$500.00; 5 wagons \$500.00; watches, clocks, etc., \$175.00; sawmill \$8,000.00; lumber \$3,500.00; all other property \$400.00, total \$28,975.00. The said document was marked Defendant's Exhibit "E."

Defendant thereupon offered in evidence a certified copy of part of the duplicate assessment book of the County of Missoula for the year 1888, setting forth assessment of W. H. Hammond for said year; that it appeared from said part of said copy of said dupli-

(Testimony of W. H. Hammond.)

cate assessment book that the northeast quarter, the southeast quarter of section 21; the northwest quarter and the northeast quarter of section 22, all in township 13 north, range 18 west, embracing 520 acres, was assessed at \$1,560.00; that the value of merchandise was \$12,000.00; the amount of capital \$50,000.00; 16 horses, \$1,600.00; 4 mules or asses \$400.00; 10 oxen and steers, over two years old, \$500.00; all other property \$120.00, total assessment, \$66,430.00. Said document was marked Defendant's Exhibit "F." [444]

(Witness Continuing:) My mill was located on the northeast quarter of section 22, township 13 north, range 18 west.

Thereupon counsel for defendant exhibited to the witness Plaintiff's Exhibit No. 8, purporting to be certified copy of part of duplicate assessment-roll for the County of Missoula for the year 1894, setting forth the assessment of the Missoula Mercantile Company.

(Witness Continuing:) I had a house in the city of Missoula, Montana, in the years 1894 and 1895. I owned a small house that was close to the residence in which my mother lived and which appears assessed to Missoula Mercantile Company in said Plaintiff's Exhibit No. 8 as "W. H. Hammond residence \$2,500.00." Referring to Plaintiff's Exhibit No. 8, the item "W. H. Hammond Levasseur house, \$400.00," is the small house that I bought from a man who formerly lived there. I do not know how the W. H. Hammond residence and the W. H. Hammond small



(Testimony of W. H. Hammond.)

house came to be assessed to the Missoula Mercantile Company for the year 1894. Missoula Mercantile Company had no interest or title to that house or to the small house alongside of it. I did not dispose of my residence and the small house until 1897 or 1898. I do not remember how much I sold it for. I think \$10,000.00 is what I got for the property. The post office was not established at Bonner until 1888, so my residence is given in these assessments for the year 1886, 1887 and 1888 as Missoula. The Missoula Mercantile Company did not have any interest in the proceeds that I received from the sale of these houses. They belonged to me. Mr. A. B. Hammond had no interest in them. [445]

Thereupon counsel for defendant exhibited to the witness Plaintiff's Exhibit No. 11, purporting to be certified copy of part of the duplicate assessment-book for the year 1895, setting forth the assessment of Missoula Mercantile Company and directing the witness' attention to the following items thereon: "Eddy residence \$2500.00; W. H. Hammond residence \$2500.00; W. H. Hammond Lavasseur house \$400.00."

(Witness Continuing:) The house called the Lavasseur house was the one I just spoke of—the little house alongside my residence. It was called the Lavasseur house, because I bought it from a man by the name of Lavasseur. I do not know how it is that my residence and the Lavasseur house came to be assessed to the Missoula Mercantile Company in the year 1895 or listed among the properties of that Com-



(Testimony of W. H. Hammond.)

pany. I know that I told Mr. Moser to take care of my taxes. I suppose that he, for his own convenience, listed the property that way. I never authorized or directed him to have my residence at Missoula listed under the head of the property belonging to the Missoula Mercantile Company. I did not have any knowledge that it was done that way prior to this time. I personally had nothing to do with directing the method of listing the property of Blackfoot Milling & Manufacturing Company or Big Blackfoot Milling Company. Mr. Moser was directed to take care of the assessments on those properties. I never had anything to do with the assessment of the Blackfoot Milling & Manufacturing Company. Mr. Moser took care of the taxes with regard to the Big Blackfoot Milling Company. Mr. Moser was secretary at one time of the Big Blackfoot Milling Company. I am not positive whether he bore any relation to the Blackfoot [446] Milling & Manufacturing Company, but I think he did. Mr. Moser was secretary of the Missoula Mercantile Company at one time. [447]

Recross-examination.

I think Moser was secretary of the Missoula Mercantile Company and the Big Blackfoot Milling Company at the same time and took care of these matters, and I expect he took care of the tax matters for the Big Blackfoot Milling Company under the directions of the board of directors of that corporation.

The witness was here asked questions concerning the personnel of the stockholders composing the

(Testimony of W. H. Hammond.)

Blackfoot Milling and Manufacturing Company and the personnel of the stockholders composing the Big Blackfoot Milling Company, and thereupon the following proceedings were had.

Mr. WHEELER.—The new corporation was substantially the old corporation under a new name, with different classes of stock and there may have been a difference, and undoubtedly there were different organizers and a few shares differently placed, but substantially it was a continuation of the old corporation. We make no point about that at all.

Mr. HALL.—You have made a statement here in the record.

Mr. WHEELER.—And I desire to stand upon it. That is exactly what I said before. I admit that it was simply a change in form for the purpose of issuing a different class of stock and that the Big Blackfoot Milling Company took over all of the property of the Blackfoot Milling and Manufacturing Company. That has been our position from the beginning.

A document in the form of an affidavit is here handed to the witness, who admits that the signature William H. Hammond appended thereto, is his signature, and that he swore to same before Gust. Moser, a notary public, on the 8th day of April, 1892. [448]

(Witness Continuing:.) I believe that affidavit was true at that time.

Thereupon plaintiff offered and read in evidence the said affidavit, stating that said affidavit was filed with the Secretary of the Interior when they desired

to have the permit to cut timber, under which the defendant justifies certain cutting on section 18, township 14 north, range 15 west, transferred from the Blackfoot Milling and Manufacturing Company to the Big Blackfoot Milling Company. The said affidavit is in the words and figures following:

**[Exhibit—Affidavit of Wm. H. Hammond Re Permit to Cut Timber, etc.]**

DEPARTMENT OF THE INTERIOR,  
UNITED STATES OF AMERICA, STATE OF  
MONTANA, COUNTY OF MISSOULA.

In the matter of the application for transfer of permit to cut timber on public lands heretofore granted to the Blackfoot Milling & Manufacturing Company.

William H. Hammond, being first duly sworn, on his oath deposes and says that he is the president and general manager of the Big Blackfoot Milling Company, and was a stockholder and director of the Blackfoot Milling & Manufacturing Company; that the Big Blackfoot Milling Company is the direct successor of the Blackfoot Milling & Manufacturing Company. That on a reorganization of the Blackfoot Milling & Manufacturing Company for the purpose of making first and second preferred and common stock and to secure other advantages, the name of the Big Blackfoot Milling Company was adopted in lieu of the former name, Blackfoot Milling & Manufacturing Company, but so far as the personnel of said companies are concerned, they are identical.



That on the reorganizing of the Big Blackfoot Milling Company it succeeded to all of the rights, privileges, franchises, property, business, goodwill, &c. of the Blackfoot Milling & Manufacturing Company, and that all operations heretofore done and carried on in the name of the Blackfoot Milling & Manufacturing Company are now done and carried on and conducted in the name of the Big Blackfoot Milling Company.

WHEREFORE, affiant asks that the said permit so granted as aforesaid, to the Blackfoot Milling & Manufacturing Company be reissued to the Blackfoot Milling Company and as in duty bound will ever pray.

(Signed) WILLIAM H. HAMMOND.

Subscribed and sworn to before me this 8th day of April, 1892.

GUST. MOSER,

Notary, Missoula County, Montana.

Notarial seal attached. [450]

**[Testimony of Chancy E. Woodworth, for  
Defendant.]**

CHANCY E. WOODWORTH, a witness called, sworn and examined on behalf of the defendant, testified as follows:

Direct Examination.

I reside at Missoula, Montana, and am a civil engineer. I was a civil engineer from and including 1885 to and including 1895. I went to the Big Blackfoot Canyon in 1888 as a general timber in-



(Testimony of Chaney E. Woodworth.)

spector of the Northern Pacific Railroad Company. I was employed in this capacity for the Northern Pacific Railroad Company about ten years. While in this capacity I had occasion to run lines and ascertain the section corners in the Blackfoot country. I know the claim or quarter section in the Blackfoot country known as the Cunningham claim—that is the northwest quarter of section 34, township 14 north, range 14 west. I was first on that section—on the line between that and section 33—14—14 in the spring of 1888. I know where the corner is that is common to sections 34, 33, 27 and 28, all in this township. I went to that corner in 1888 and ran a line from that corner south between said sections 33 and 34—that was the line between sections 33 and 34. I observed at that time the condition of the land immediately to the east and west of that line. They were cutting on section 33 at that time and no work had been done on section 34. There was no evidence at that time of the cutting of timber upon the Cunningham claim. I participated in the work of scaling timber on section 33—14—14. I know the Kelly claim; that is the northwest quarter of section 18, township 13 north, range 14 west. I was first upon that claim about 1890 or 1891. It was in 1890 that I was there first. Afterwards, I was there in 1891. In 1890 I was on that claim and the next section to it. That was section 13, [451] township 13 north, range 15 west, lying directly west of the Kelly claim. I ran a line at that time between said section 13 and said section 18. I was running the

(Testimony of Chaney E. Woodworth.)

lines for the purpose of sealing. I had an assistant doing the sealing and I was running the lines for him. At that time I observed the condition of the land to the east and west of the lines which I ran, that is, the dividing line between sections 13 and 18. I ran the line as far as they had cut on section 13 at that time; I should judge it was pretty close to the south line, perhaps three-quarters of a mile. I began to run from the northeast quarter. The railroad section was cut, but the land which was later known as the Kelly claim was uncut. I am referring to the time when I was there in 1891. When I was there in 1890 I ran this same line for my assistant. In 1891 I was checking it up to see whether the timber was cut clean or not.

#### Cross-examination.

I have been on the Kelly claim several times since 1891; perhaps not right on the Kelly claim. I have not been on it to inspect it. I have never been there since 1891—not on that line—to inspect it to see whether or not the timber was cut. I don't know anything about when the timber was cut. I did not scale it. I don't know what year it was cut in. When I was running those lines I was running them for my assistant and to find out where the lines were for my own knowledge. I wanted to know where the line was between sections 13 and 18 because I had general charge of the Northern Pacific timber in that valley. I was not engaged in Government work nor interested in Government lines. [452]

Q. It was not a part of your duty to inspect Gov-

(Testimony of Chancy E. Woodworth.)

ernment lands to see whether or not the timber had been cut off of them?

A. It was part of my duty to see that we did not take any logs off of Government lands.

(Witness Continuing:) I was there to see whether the timber had been cut off of the railroad lands or not. I have had in mind the time I went down there in 1890 to inspect the Kelly claim. I did not see Mr. Kelly on that claim or see anybody there. I don't think I ever saw anybody living on that claim; it has not been inhabited, that I know of; I could not say when I was there in 1891. I know pretty well when I was there in 1890; that was late in the fall. If I made any notes of my visit there, they are destroyed by this time. I am testifying, not from any notes, but just from my recollection of twenty-five years ago. As to the extent of going over the Kelly claim, I went to the line between the two sections. I did not go over any in the interior of the Kelly claim. There was no timber cut off of it in 1890. I know this, for if we see roads or anything of that kind, it is our duty to see that no timber from any of the even sections gets mixed up with the timber from the odd sections. I did not have to go back into the interior of any of these even-numbered sections to see whether or not timber had been cut on them. All I was engaged in doing was to find out that they were not cutting over the line and to see that they were cutting as close to the line as possible, so that the railroad company would get all of the timber that it had claim to. We tried to cut



(Testimony of Chancy E. Woodworth.)

right up to the line. That was my business. I did not pay any attention to [453] the interior of the even-numbered sections. I don't know what may have been cut on the interior of the Kelly claim in 1890 or 1891. When I was surveying the line between sections 33 and 34, township 14 north, range 14 west, I was out on the same mission. I was surveying out that line in 1888—the first year I was in the valley I did not run the north line of section 34. I was only concerned with section 33. My business and object was to pursue the same line of work as regards the line between 33 and 34 as it was between section 18–13–14 and the adjoining section 13–13–15. I know nothing more about the interior of the Cunningham claim in 1888 than I did about the Kelly claim in 1890; probably I only spent a fraction of one day on this line between the Cunningham claim in section 34 and section 36. I don't think I ran for other section lines that day. I cannot tell how many I ran the day before, but I ran a line on section 29. Section 29 had been cut before—I suppose by the Hammond people. I was looking after the odd sections. It is difficult for me to say how many sections altogether I ran in the winter of 1888, but I have every reason for saying that I ran out hundreds of section lines. All I can remember particularly is the condition of the land and timber between the Kelly claim and section 33. As to whether I remember the condition of all the other even-numbered sections that adjoin the odd sections that I ran out the lines on, many of these lines were in the



(Testimony of Chaney E. Woodworth.)

prairie. I was looking for timber. Of course, there is no timber on the prairie, but very often we have to run those lines from there in order to tie in to our lines in the timber. We ran out the line between sections 5 and 8, in township 13 north, range 14 west, in 1888. [454]

#### Redirect Examination.

I was actively engaged for about six years in this business of running lines for the scalers on railway lands. I knew that railroad lands were being cut over because it was my business to know. I was there for the purpose of taking care of the Northern Pacific timber in the State of Montana. It was part of my business to know just where the company was cutting and I made it my business to know where the company was cutting for five or six years. If there had been any cutting done on the Kelly claim prior to the time of my inspection, I would have known it. On the Cunningham claim, I don't even remember of running out the lines between sections 27 and 34, in township 14 north, range 14 west. Concerning the topography of the Cunningham claim with reference to section 28, upon which it cornered—section 34 is situated high up on the hill with a slope to the north and in the northwest corner there is a basin and from there down to the Edgar claim there is a drop that goes off for perhaps 20 rods, then there is a bench and then it drops down hill to the Edgar claim. From the line that I ran between sections 33 and 34, I would see the Cunningham claim as far as I could see into the timber. There

(Testimony of Chaney E. Woodworth.)

was a basin there and I could probably see a quarter of a mile into it. So far as I could see from the line that I ran, no timber had been cut there. With regard to the Kelly claim, having reference to the topography of that country, I could see an eighth or a quarter of a mile. If there had been any timber cut on the Kelly claim, or the lands immediately surrounding it, I think it would have been possible for me to know it. [455]

Recross-examination.

My occupation for the past year has been attempting to run a ranch and I have been employed by Mr. Hammond in connection with this case, looking up the evidence, taking the witnesses out over the land and coaching them. Showed them where the lines and corners were. Out of all the hundreds of sections that I have surveyed and scaled up there, I remember absolutely the condition of the timber on the Cunningham claim in 1888 and the condition of the timber on the Kelly claim in 1890. I testified to that from my memory. It was not a part of my business, and I was not paying any attention to the timber that may have been cut on any of the even-numbered sections. I could not say positively how much was cut or whether any was cut on the interior of either one of those claims. [456]

**[Deposition of Patrick Hayes, for Defendant.]**

The deposition of PATRICK HAYES, a witness called and sworn on behalf of the defendant, was offered and read in evidence by the defendant, as follows:

(Deposition of Patrick Hayes.)

Direct Examination.

I reside at Potomac, Missoula County, Montana. I am fifty-eight years old. By occupation I am a farmer. I raise hay, oats, cattle, horses and own a thousand acres in that vicinity. I also am a notary public and a member of the Board of Trustees of the Missoula County High School. I first came to the Blackfoot Valley in 1886. When I first arrived in the valley, I worked awhile in the timber, logging; and then bought out a man here, the claim I now have and where my farm now is. After I settled on that place, I went to work for W. H. Hammond, the latter part of August, '87, I guess. I took charge of some logging operations over on the Blackfoot River, section 29, township 14 north, range 16 west. My camp was located about the east line of the section, between 28 and 29, township 14 north, range 16 west. I had charge of the work. We cut logs and banked them and hauled them to the river. I was familiar with the land of section 29, and with section 28, which adjoins section 29 on the east. All the logging timber was then standing on said section 28; there may have been a few trees cut there but nothing to speak of. There might be some ties, or something cut, or something like that, but there was no logging done on section 28 at that time. There had been no go-deviling done on that section at that time. There was a trail ran through that section known as the Pend O'Reille; it ran north of the quarter stake between sections 28 and 29 on the north or west side of the river. We always called it



(Deposition of Patrick Hayes.)

the north side. When you are on the left-hand side going up, we call it the north side. [457] and the other side is the south side. I traveled over that trail every year since. I remained familiar with that section 28 every year since, sometimes I passed through it five or six times a year during the summer season. Two or three years after I was there the timber was cut. I don't just remember the date. It was cut by William Longley and at that time he was living there on the ground, on the northwest quarter of that section. Mr. Longley cut on the north or west side of the river in the northwest quarter of section 28. After Longley settled on the northwest quarter of section 28 the name given locally to part of that claim and the country below it further down the river was the Longley Flat. The Longley Flat extended down the river from the northwest quarter of section 28. It took in principally all of section 29. I recall after Mr. Longley settled on this claim a fire running through a part of his timber or in that vicinity. I believe in '89 it was a very dry summer. I think these old cuttings on 29 was burned at that time and the fire extended over to 28, of course. I am acquainted with section 26, township 14 north, range 16 west. I have been traveling through there after stock and I owned part of it at one time—twenty acres in this section. I knew of a logging camp that was located on that section by McNamara. I believe it was in '88 that McNamara had his camp there. At that time, in 1888, when I was familiar with said section 26 the



(Deposition of Patrick Hayes.)

timber was standing on it; there was no logging being done; there might be a few trees cut here and there, but there was no logging outfit on it. I know of logging operations being conducted on that section by Pat Dunnigan. I am sure it was in '95. The timber remained standing in said section 26 [458] until it was cut by Pat Dunnigan in 1895. I want to be understood that there might be a few trees, ties, or something cut but there was no logging done. I don't think there had been any go-deviling done.

Cross-examination.

By go-deviling, I mean that is when they are close to the river they put these logs on the travois, something like that, and haul it into the river—some kind of little sled. I was born in New Mills, New Brunswick County. I did not know Mr. A. B. Hammond there, but I knew Henry Hammond. I knew him on Puget Sound. Immediately after I came to Montana I commenced to work for Henry Hammond. I came here probably for the purpose of working for Henry Hammond; I was writing and came up here. Anyway, I went to work for him down about Thompson in 1882. I came here in 1882 and I worked for Henry Hammond from then until the first of April, '83. I started again working for Henry Hammond in 1886. The last work I did for Henry Hammond was when I worked on that section 29, township 14 north, range 16 west, in 1887 and 1888, I think the last work was in 1888. My business relations and dealings continued with the Hammond people for

(Deposition of Patrick Hayes.)

quite a number of years after that. I could not say the Hammonds and I were very friendly. I was intimate with them. Sometimes we used to quarrel like the deuce. Off and on I had business relations with the Hammonds all these years. I could not say I am very friendly with Henry Hammond, but I kind of like the man, that is all there is to it. I first got acquainted with A. B. Hammond when I was working below Missoula. I never worked for A. B. Hammond when up in the Blackfoot country.

Q. He never was up there? [459]

A. He passed by there once; I remember one time he passed by.

(Witness Continuing:) I was on the ranch, he stopped there and had his dinner. When I was working up there A. B. Hammond was never working around there; he had nothing to do with it. It was all Henry Hammond. All I knew of the operations on the Big Blackfoot was Henry Hammond. He was the head push of them all; directed all operations and cutting up there. I was working for wages for the Hammonds. The only place I did cutting in township 14 north, range 16 west, was in that one section 29. Possibly I might have done a little in 19. I never cut any my self on section 28. The first cutting I did on section 29 was in '87. We had a camp down there about on the line right close to the edge of the Longley claim. It was two or three years after '87 that the timber was cut off the Longley claim; I would not be positive whether it was two or three. The logs that Longley cut on the

(Deposition of Patrick Hayes.)

Longley Flat were banked on the river and went to Bonner. There wasn't any other mill they could go to. I was about section 28 when there was a camp on the east side of the river. A man by the name of Michels cut that. I think it was along in 1894 or '95. It was some years before that that a bridge was put across there. Kilburn had a camp there at the time the bridge was put across. It was across the river on the east or south side of the river; that was in '90, I guess, or '91. Afterwards Michels built a camp there. A bridge was built every year anybody was over there. There was no logging on the Longley Flat before 1890. I was there in '87 and '88. It was in '90 or '91 that there was logging done there. [460] I am not positive about those dates. It was a long time ago and I have nothing in particular to refresh my memory in regard to that. I do not want to fix the date when the timber was cut off of that flat by Longley, but I know Longley was there in 1890, and there was no timber cut there before Longley settled on that, except there might have been a few ties or something like that; no logging done; no logs put into the river. I am absolutely positive of that. I was paid for my cutting on section 29 by getting a check for it or I got credit for it; I guess I was in debt to them for supplies I got on the ranch. I was in debt to W. H. Hammond. I guess I got credit for the work I did on my account. My account was with W. H. Hammond. I got some supplies from him and some from the Missoula Mercantile Company, but when I set-



tled up for my work on section 29, it was applied only on my account with W. H. Hammond.

**[Deposition of Henry W. Martin, for Defendant.]**

The deposition of HENRY W. MARTIN, a witness called and sworn on behalf of the defendant, was offered and read in evidence by the defendant, as follows:

**Direct Examination.**

I reside at Sunset, Powell County; that is in section 6, township 13 north, range 14 west. I was familiar with the claim there known as the Elijah Cunningham claim. It is the northwest quarter of section 34, township 14 north, range 14 west. I first became acquainted with that claim in 1889. We were running a sawmill there, old man Morris and I, and we had occasion to get water from the Big Fish Creek and to bring this water from Big Fish Creek. We cleaned out an old water ditch on this quarter. This was the first time I was on that ground; that was probably in the middle of summer, May or June. I was on that claim several times after that. I [461] was on it after Elijah Cunningham took it up. The first time I met Elijah Cunningham to get personally acquainted with him, was when he came to my place looking for work at the sawmill; that same summer he went to work for me. That was the summer of '89. I had occasion to visit that claim of Mr Cunningham's.

Q. When Mr. Cunningham settled on that claim, can you state whether or not any of the timber had been cut therefrom?

A. Of course, I did not run right to the edge of



(Deposition of Henry W. Martin.)

the line to see if any of it was cut; the timber was all standing; the first connection I had there, he was working at the sawmill; he wanted me to go over and take up a claim adjoining it; we went over and looked the section over pretty thoroughly.

(Witness Continuing:) Part of the timber on that Elijah Cunningham claim was cut by Mr. Kilburn the same year he cut the Sontag claim. Kilburn must have cut about half of it and the balance of that claim was cut the next year when Mr. Boyd was cutting the Silvey claim. Prior to the time of Mr. William Boyd and Mr. Ernest Kilburn cutting the timber on the Elijah Cunningham claim, there was no evidence of any timber around there being cut.

Cross-examination.

The Cunningham claim corners on the Edgar claim and there is quite a slope up from the Edgar claim to the Cunningham claim. It slopes to the south and west. As to whether I am absolutely sure whether there was no timber cut off of the Cunningham claim prior to 1892, we traveled over the section with the intention of taking up a claim and we found none cut. [462] We started at the cabin almost to the quarter corner on the north side of the claim and we passed mighty close to the east corner. The cabin was right close to the west line and right below a little ditch. The cabin was right in the timber. The timber was lying right due east. In reference to the Edgar house, the cabin was just up from the little house—the Edgar house was down on the flat. This

(Deposition of Henry W. Martin.)

Cunningham house was up in the gulch. I cannot be much mistaken about the year when this was cut. Cunningham was showing me the timber I could take up on the east of his claim. When I went with him on his claim, I am sure we did not go through any timber that was cut. There was some timber cut right alongside of us, west of us, and there was a little timber cut north of us. There could not have been any other timber cut and I not have seen it. We went all over the claim; we walked in there for three or four hours. I did not notice any indication of any scattering trees taken out of there. There was no evidence of timber being cut.

**[Deposition of E. R. Kilburn, for Defendant.]**

The deposition of E. R. KILBURN, a witness called and sworn on behalf of the defendant, was offered and read in evidence by the defendant, as follows:

Direct Examination.

My full name is Ernest Robert Kilburn. I reside at Ovando, in the Big Blackfoot Valley, Montana. I am engaged in general merchandising. I am familiar with the tract known as the Henry F. Edgar claim; that is the southeast quarter of section 28, township 14 north, range 14 west. I became familiar with that claim in 1885. I worked on that claim in the late fall of 1885 and the early winter of 1886. I scaled logs on that claim. Henry Edgar cut the logs on that [463] claim at that time. I scaled between five and six hundred thousand feet of logs on the claim cut by Henry Edgar at that time. Part

(Deposition of E. R. Kilburn.)

of those logs were hauled to the Blackfoot River by Mr. Edgar—that was the winter of '86. He hauled until the snow melted and the sleighing broke up and then he had to quit. The balance of that five hundred thousand feet of logs cut by Mr. Edgar which were not taken to the river by Mr. Edgar, were hauled on trucks to the river the latter part of April, 1886. I drove a team, helping haul them. After this five to six hundred thousand feet of timber had been cut by Mr. Edgar, the remaining timber on the claim was cut in the late summer and early fall of 1886. I did not participate in the cutting of that timber. I scaled some of it that fall. There was a fire broke out in the cuttings in the Edgar claim either the latter part of August or the first of September, 1886. I was over on the Hammond ranch looking after making some hay and they sent down and took what men I had to help fight the fire; Mr. Edgar was also making hay on the Israel Clem ranch, which is now owned by Henry Martin, and they came after him also; he had a couple of men working for him and he took them and he was gone two days helping fight the fire there on his place. Cunningham worked a little while at the old headquarters camp at Fish Creek when he first came out from Minnesota, I should say probably two or three weeks before they sent him down to the foot of Nine Mile Prairie to take charge of a logging camp there. I am not positive that Cunningham—I am not positive just where he worked, but I do know that Bob Moore, foreman of the Fish Creek Camp, was cutting and



(Deposition of E. R. Kilburn.)

skidding logs on the Edgar claim at that time. I also know positively that they were [464] not in the habit of letting anybody lay around when there was work to be done, and while Cunningham was there he must have been working on that claim, the Edgar claim. Mr. Edgar was there on the Edgar claim when I was working there in the spring of '86. In the summer of '86 on that claim there was in the neighborhood of two or three acres in cultivation. Edgar cleared the stumps and the small brush off the ground and he plowed and planted it to potatoes and other vegetables. I have had experience farming in Montana, and am in a position to state whether the Edgar claim was of a character that was susceptible of development into a farm and home. At that [465] time Edgar had two log houses; one he used to live in and one where he had a bunkhouse for his men; he had a stable, and the land he had cultivated was fenced. The fire I have spoken of destroyed his fence around his plowed ground, his garden. I recall the time when Henry F. Edgar made final proof upon his claim, in the early spring of 1886. I was a witness in that proceeding, which was held in Missoula. Attorney Thomas C. Marshall represented Mr. Edgar in that proceeding.

Q. Now, I will ask you what was the condition as to whether or not any standing timber remained on Henry F. Edgar's claim after the cutting you have testified to in the summer and early fall of 1886?

A. The only timber that was left was trees that were too small for saw logs at that time. I might



(Deposition of E. R. Kilburn.)

add to that, that at this day they take trees a good deal smaller than they did at that time; they might be called saw logs this year, but those days we did not take anything below twelve or fourteen inches on the stump.

(Witness Continuing:) I became familiar with section 28, township 14 north, range 16 west when I got a contract to log on section 33, in that township, in the fall of 1890. I built my camp on the northwest quarter of section 28; on the east side of the river; that would be on the right-hand side of the river going up stream. The Blackfoot River ran through the northwest quarter of that section. At that time no timber had been cut off that section 28, particularly the northwest quarter thereof. When I was there there wasn't any timber cut, but there was three or four dozen trees cut along there. I would not consider it any timber; the section was virgin as far as cutting timber would be considered, a virgin claim. I knew [466] William H. Longley. At that time he was living on the same quarter section, right across the river from where I built my camp—nearly directly across. I am familiar with the claim known as the Elijah Cunningham claim. That is the northwest quarter of section 34, township 14 north, range 14 west. In the fall of 1891, I logged all the timber adjacent to Big Fish Creek on that claim, and at the time I did so no timber whatever had been cut from said claim prior thereto, excepting a few trees cut for cabins and fencing. I am familiar with the south half of section 20, township 14

(Deposition of E. R. Kilburn.)

north, range 15 west, known as the Kilburn claim. I am the Kilburn whose name is given to this claim. I took up one hundred and sixty acres on said section 20. And when I did I examined the claim to determine whether the timber was standing on it and found the timber all standing there—none cut. I never cut anything from that claim and I sold the claim, and at the time I sold it no timber had been cut therefrom. I sold it to McLaren and McKinnon of Wisconsin.

Cross-examination.

I was born in New Brunswick, Canada, and came to the United States in January, 1884. I was twenty or twenty-one years old then. I became a naturalized citizen of the United States. I think it was in 1887 I got my second papers in Deer Lodge. I was living in Deer Lodge County then. I am a distant relative of A. B. Hammond. My mother and A. B. Hammond's mother were cousins. January, 1884, was the first time I met him. It was in Missoula. The circumstances surrounding my first meeting with him were when I came to this country, I wanted a job; Mr. Hammond was in the mercantile business here, I asked him for a job. He told me I could [467] go to work up the canyon, at the sawmill at Turah. I don't know whether this sawmill belonged to Eddy-Hammond and Company or the Montana Improvement Company, but whatever it was, I think A. B. Hammond was interested in it. A man by the name of Coombs was in charge there, and I worked at that camp about six weeks. From there I went to

(Deposition of E. R. Kilburn.)

Missoula, where I drove a delivery team for Eddy-Hammond & Company. My next employment was in the Blackfoot. I went up the Big Blackfoot in the fall of '85 and was hired by George L. Hammond. George L. Hammond asked me to go up there as timekeeper and scaler for him. When he asked me to do so I was not employed by Eddy-Hammond & Company. I was not employed by anybody. I commenced work for George L. Hammond at the Fish Creek Camp, in 1885, and remained at that camp until the spring of '87. I was not employed all of that time as timekeeper. In October, '86, I went to work for the Northern Pacific under W. A. Logue. So it is true that I did not work for George L. Hammond there at Fish Creek during all the time from '85 to 1887, but I stayed there in the camp. I was scaling for the Northern Pacific. George L. Hammond was superintendent of all the works and of the cutting of the timber that I was scaling for the Northern Pacific. During the time I worked under George L. Hammond at the Fish Creek Camp, I was paid by getting a time check on W. H. Hammond. Those time checks were usually cashed at his place of business at Bonner, and this method of payment continued as long as I worked for him; that is to say, until the fall of '86, when I went to work for the Northern Pacific. Henry or W. H. Hammond was in complete charge and control of all these operations during 1885 and 1886. I know it, for any time we had to get any orders, we always went to [468] W. H. Hammond. All the timber that was



(Deposition of E. R. Kilburn.)

cut up there during the years I worked there was cut for W. H. or Henry Hammond. It was in the fall of 1885 I did the first scaling on the Edgar claim. George L. Hammond directed me to do it. Mr. Edgar was present when that was directed—living there. Mr. Edgar was present on the claim when I was hauling some logs off it in the spring of '86 that he had left. I first got acquainted with Mr. Edgar the first year I was here in Montana, in 1884. Mr. Edgar moved on to his claim shortly after I went to Fish Creek Camp. I remained familiar with the claim after the timber was removed from it in 1886, off and on until 1891. I don't know the exact year that Mr. Edgar finally moved off the claim, but should judge about 1889. I was familiar with the claim from 1885 up until 1889, when it was occupied by Mr. Edgar; during the winter of 1887, I scaled logs for the Northern Pacific for the Headquarters Camp on Fish Creek. John Cunningham was not foreman of the camp in the winter of '87-'8. He was foreman of that camp probably in 1888. Cunningham went to the Eckwall Camp in the fall of '86, and was there the fall of '87 and part of the winter of '87. I am certain that no timber was cut off the Edgar claim by Cunningham in the winter of '87 and '88, that is, commencing in the fall of '87 and running into the spring of '88. There could not be any because Bob Moore had already cut it in the fall of 1886. I scaled a little of it, not all of it. J. B. Seeley took my place in October, 1886. I am not sure whether he scaled it or not. In the fall of '87 I was scaling logs for the



(Deposition of E. R. Kilburn.)

Northern Pacific on Montour Creek. I was not at Headquarters Camp in the fall of '87, nor the spring of 1888, but I can swear [469] there was not any timber cut off the Edgar claim from the fall of '87 until the spring of 1888, because it was all cut in the fall of 1886. I said awhile ago, there was not anything left but trees that were too small to make saw logs of at that time.

Q. Might there not have been saw logs cut the next winter and spring? A. No, they did not go back.

(Witness Continuing:) I am certain they did not go back—just as certain as if I was standing watching it all the time—which I was not doing; but there is no guess work, I know it. They did not go back there, for there was nothing there to cut. I said awhile ago there was some of those small trees standing there, but they would not send a crew back to cut them. That is my opinion. I don't believe they did. I am not positive about it any more than I am sure they did not go back on that claim after Moore got through cutting; the trees are there yet. I went all over the Edgar claim last month in company with W. H. Hammond, William Boyd, George Fox, Mr. Woodworth, and I believe Mr. Burnett was with us. On my last trip there I saw a patch of Canadian thistles, or some kind of thistle, indicating where there had been some cultivation **years and** years ago; that was the old garden spot where Edgar had his cultivation. I did not see any signs of or indications of cultivation outside of what I have said. This fire that ran through there in 1886

(Deposition of E. R. Kilburn.)

burned Edgar's fence. It was a log fence, probably then of a value of \$50.00. That was in the fall of '86, the early fall, that it was burned. About five or six hundred thousand feet had been cut from the [470] Edgar claim before that. The value of that five or six hundred thousand feet was \$1.00 a thousand standing; \$3.50 on the skidway; \$4.00 on the bank of the Blackfoot River. I do not know what Mr. Edgar received for that five or six hundred thousand feet of timber that was cut off prior to the fall of 1886. According to my rates \$1500.00 would be a big price for him to receive. I don't mean to say that the loss of \$50.00 worth of fence by fire in the fall of 1886, after he had presumably received this \$1500.00 for the timber, would have anything to do with preventing him from going on and cultivating and improving that claim. I came to be a final proof witness for Edgar because I was living near him. I don't know whether he asked me to be such witness or whether he put my name on. Mr. Thomas C. Marshall conducted the matter of making the final proof and attempting to secure patent. He was a lawyer here at that time and is now dead. I don't know whether he was an attorney for the Hammonds at that time. In later years he was their attorney. After I quit scaling on the Edgar claim and working for the Northern Pacific, I got a logging contract from George L. Hammond on Montour Creek. Montour Creek empties into the Big Blackfoot River about five miles west of Ovando. My next work for the Hammonds was in the fall of 1890, when

(Deposition of E. R. Kilburn.)

I got a contract from W. H. Hammond to log in section 33, township 14 north, range 16 west. During the fall of 1890 and the spring of 1891, I cut off said section 33. I built a set of camps on section 28 that winter. At that time I did not know where the lines of 28 was, but by the location of the camp I must have cut off of section 28 the material for building those camps. I cut off right east of the camp. I testified that no timber of any commercial value had been cut from the northwest quarter of section 28 [471] prior to 1890. I did not make any special examination to see whether timber had been cut or not, but by riding backwards and forwards over the section every day, I did observe there were no trees cut on that side of the river. On the other side of the river a few small trees had been cut for building purposes. I was riding over on that side of the river, too. I had business backwards and forwards. I crossed the river at that time on a bridge near the north line of 28. I know there was some cutting on the left-hand side of the river in the flat on the railroad section 29 about 1886 and 1887, but there was none on the flat on section 28. I will swear positively that from a logging standpoint there had not been any cutting on the Longley Flat on the left-hand side of the river prior to 1889—that there had been none cut for any commercial purpose.

Friday, January 24, 1913.

**[Deposition of W. H. Longley, for Defendant.]**

The deposition of W. H. LONGLEY, a witness called and sworn on behalf of the defendant, was



(Deposition of W. H. Longley.)

offered and read in evidence by the defendant, as follows:

Direct Examination.

I reside at Missoula, Montana. I am familiar with the claim known by my name, situated in section 28, township 14 north, range 16 west. I settled on that claim in the spring of 1890. At that time no timber had been cut therefrom. I cut timber on that land myself in the winter of 1891; I cut timber on the south half of the northwest quarter on my claim; I would call it on the north side of the river. It was on the left-hand side of the river going up stream. Tuchenhausen assisted me in cutting that timber. At that time I cut somewhere in the neighborhood of 300,000 feet from my claim, I recall the land through which the Blackfoot River runs after it leaves my place—the land lying north of my place. [472] A man by the name of Merrick had a claim there. Merrick settled there after I did, and when he settled there I never noticed that any timber had been cut from it, except for the purpose of buildings, and so on. I built cabins on my claim. They were on the north side of the river, as I call it. The last cabin I built was pretty close to the Merrick claim, where the river runs through it. It could not have been more than thirty or forty rods, maybe.

Cross-examination.

I am fifty-eight years old; I was born in the city of New York and came to Montana twenty-five years ago this fall. I worked for A. B. Hammond, I think it was in '87, '88 and '89. I worked for him at the



(Deposition of W. H. Longley.)

Blackfoot Mill at Bonner; I was running a planer there. After I quit the mill at Bonner, I went up on to this claim then directly. As soon as I offered my final proof, I quit the land and sold it pretty quick afterwards; I sold it to Gus Moser. I knew Gus Moser was working for the Big Blackfoot Milling Company. I don't remember exactly whether Gus approached me first or I approached him. I went to a man by the name of Hershey to make my final proof on this claim. My final proof was made, I believe, in 1892. My proof witness was Merrick and some other fellow.

Redirect Examination.

I said I worked at Bonner, at the mill, in 1887, 1888 and 1889. Henry Hammond employed me to work there.

Q. You said on your direct examination that you worked for A. B. Hammond.

A. I supposed that was the same thing.

Q. But the person who employed you was W. H. Hammond? A. Yes. [473].

Q. You simply supposed A. B. Hammond was interested in that?

A. Yes; W. H. Hammond was the man I worked for.

**[Deposition of William Tuchenhagen, for Defendant.]**

The deposition of WILLIAM TUCHENHAGEN, a witness called and examined on behalf of the defendant, was offered and read in evidence by the defendant, as follows:

(Deposition of William Tuchenhausen.)

Direct Examination.

I was born in Germany and am a naturalized citizen of the United States. I once worked in the Blackfoot Valley. I took up a claim there. It was on section 18, township 14 north, range 15 west. I had the southeast quarter of that section. I didn't get the full one hundred and sixty acres; it was a short section. I am well acquainted with that section 18; I lived there a little over two years and made my continuous residence there. I settled on that claim in 1889, in the spring. After I settled there, the claim was commonly known as the Tuchenhausen claim. I proved up on that claim about 1890. I filed in 1890. It was unsurveyed land when I settled; I got a final receipt for that land; patent issued to me for that land. After I had that claim about two years, maybe better, I sold it. I was familiar with this entire section 18 at the time I settled on what might perhaps be called the southeast quarter of it. At the time I settled on that section, no timber that I know had been cut from it; if there had been, I wouldn't have settled on it. I was familiar with the rest of the section. I went over it at the time I settled on my own particular part of it. At the time I sold my claim, some timber had been cut on my claim; I cut some for my buildings, and that is all that had been cut on my claim, for my buildings and fences, the biggest portion was cut on my claim. As to the rest of the section at the time I sold, [474] no timber had been cut off it; if any was removed, I removed it myself, as I may have possibly run over

(Deposition of William Tuchenhausen.)

the lines, but with that exception, no timber had been cut off that section at the time I sold the southeast quarter of it. After I sold this claim, two years or better after I settled on it, in the spring of 1889, I went to work for William H. Longley; that was two and a half or three miles just below me on the Black-foot River, on the property that was called the Longley claim. At that time Mr. Longley and his family were living on that claim. I built a house for Mr. Longley on the claim and when I was through building the house, I went to help him cut timber and pulled them into the river bank. It was on the left-hand side of the river, going up stream that I cut the timber from Longley's claim, and the house I built was on that same side of the river. I never scaled the logs I cut on Mr. Longley's place, but I judge there was between two and three hundred thousand feet of lumber sawed. At the time I cut Mr. Longley's claim, there had been no timber cut on it in addition to what I myself cut, as far as I know; the corners were there and I and Mr. Longley went to the corners and worked from the corners, so that we wouldn't go over on to somebody else, and I had to watch the lines. There was no other cutting, and I believe that the first cutting, the first logs that were cut there, were cut for those buildings.

**[Deposition of Charles F. Malloch, for Defendant.]**

The deposition of CHARLES F. MALLOCH, a witness called and sworn on behalf of the defendant, was offered and read in evidence by the defendant, as follows:



(Deposition of Charles F. Malloch.)

Direct Examination.

I reside at Lothrop, Missoula County, Montana. I knew of the claim known as the John Kelly claim; situated in [475] the northwest quarter of section 18, township 13 north, range 14 west. It was in 1896 that I was acquainted with that claim. I was sent up there by a party to scale a small quantity of timber they had on that location. I scaled the most of it; I think there was a little left. George Hammond cut that claim. I scaled the logs and reported to the office at Bonner. They were cutting while I was scaling. It is rather vague to me now as to the amount of timber that I scaled that had been cut on that claim; I think it was somewhere from twelve to thirteen hundred thousand. I don't remember whether or not at that time there was any evidence of any earlier cutting on that claim, such as stumps. The circumstance that fastened in my mind the particular year when I scaled that claim was that it was the year I came West; I had been East about three years, I think, and came West that year.

Cross-examination.

I don't think there was any old stumps at the place where I was scaling, but it is so long ago, I could not say positively; I made no examination of the surrounding land, there was some old cutting in that neighborhood; I don't know whether it was right up against that line; the sum total that I know about it is, that I just simply went up there and scaled on what they told me was the Kelly claim. I don't remember whether I looked at the lines or not; if I



(Deposition of Charles F. Malloch.)

looked at the lines I knew where they were, but I will positively swear that I followed the cutting up there that was being done by George Hammond, and that what they cut was known and called the Kelly claim. I don't think I knew Mr. Boles at that time; I did not talk with him about the cutting. I have not any recollection now of having heard at that time of any previous trouble [476] between Mr. Boles and Mr. George Hammond about cutting off that. If I had spent the whole winter, I would have a more definite idea of it. I was sent up there and they then asked me to take charge of the yard at Bonner; it was only a short time and it was so long ago it is very vague.

Q. Are you as vague, and indistinct and indefinite about the date as you are about the location?

A. Oh, no; I know it was in the fall of the year; I don't know the exact day I went out, but somewhere about the latter part of October, maybe a little later; when I came back I know there was snow on the ground.

(Witness Continuing:) W. H. Hammond directed me to go up there to do that scaling. Mr. A. B. Hammond had nothing to do with it that I know of; he was not up there; I was never employed by him.

Q. During the entire time you operated on the Blackfoot River, Mr. W. H. Hammond, or Henry Hammond, was in complete charge and control of it?

A. All the years I was there he was the man who had charge. That was from 1888 to 1893—then from '96 until he quit when they sold out—I think it was '98.

(Deposition of Charles F. Malloch.)

Redirect Examination.

At that time I did not scale anything else but the Kelly claim, and the scaling that I returned the amount of, was supposed to be the timber that they took off the Kelly claim. I know it was just about done when I left there; they might have cleaned a piece after.

Recross-examination.

I don't remember whether or not there was any cutting over the lines of the Kelly claim. I may or may not have known [477] exactly where the lines were. The scaling sheets were returned to the Bonner office. I had nothing to do with the office at Bonner. I am not sure who was in charge at that time. It seems to me Harrison was bookkeeper, I am not sure; there were several changes there, possibly Mr. Young was in charge at that time. At the time I was foreman at Bonner, I had charge of the billing of some of the lumber—the rough lumber from the yards. Along the first two or three years I billed the lumber from the planing mill, too. The lumber was billed from the station called Bonner on the Northern Pacific. I did all the billing. Whatever I sent out, I billed myself. The manner in which the lumber was billed when I first went there was as follows: There would be an order come in for a certain amount of lumber for a certain firm; that order was made out and sent to me and I would fill out the order, get it out and send my return to the office. For the first few years, W. H. Hammond was designated as consignor. I am under the impres-

(Deposition of Charles F. Malloch.)

sion that for about two or three years, it was some little time after 1888, Mr. Hammond continued to be designated as consignor of that lumber—at least until 1890. After that period of time I think it was the Blackfoot Milling and Manufacturing Company who was designated as consignor. I am a little vague whether that came first or not; then it was changed again—Big Blackfoot Milling Company, some little change, I have forgotten which came first. I am not sure if I was there when the transition from the Blackfoot Milling *Milling* and Manufacturing Company to the Big Blackfoot Milling Company took place; I think that was when I was away. It is a fact that W. H. Hammond or Henry Hammond continued there in absolute charge and control of that business during [478] all the changes, whatever they might have been, while I was working there; he had complete charge until they sold out to the Daly estate; then he had charge there for a short time after that. I could not tell you, not to be definite, how many years the lumber was billed out of Bonner in the name of the Blackfoot Milling and Manufacturing Company as consignor. I did not pay much attention to it; it was only a slight change anyway. It must have been a year or two.

#### Redirect Examination.

I do not pretend to know at all the precise period of time the lumber was shipped in the name of W. H. Hammond; nor the precise period of time the lumber was shipped, if it was shipped, in the name of the Blackfoot Milling and Manufacturing Company; nor



(Deposition of Charles F. Malloch.)

do I pretend to know the period of time it was shipped in the name of the Big Blackfoot Milling Company. I am not prepared to say whether or not the Blackfoot Milling and Manufacturing Company came into existence sometime before lumber was shipped in its name, if it was so shipped in its name. I do not know when the Blackfoot Milling and Manufacturing Company came into existence. I do not know how long it was in existence but I think some lumber was shipped in its name.

Recross-examination.

Q. You are pretty vague and indefinite about these transactions?      A. It is a long time ago.

Q. You don't remember very much about it.

A. I have told you what I remember.

**[Deposition of William Boyd, for Defendant.]**

The deposition of WILLIAM BOYD, a witness called and sworn on behalf of the defendant, was offered and read in evidence [479] by the defendant, as follows:

Direct Examination.

I reside at Woodworth, Powell County, Montana. I am farming and stock-raising. I have some land in township 14 north, range 15 west, and some in township 16 north, range 15 west, in all about 3,200 acres; part of it is a hay farm and part of it is grazing. I am familiar with the tracts of land known as the Silvey claims, embracing the west half of the northeast quarter and the southeast quarter and the south half of the southwest quarter, all in section 22, township 14 north, range 14 west. I cut the tim-



(Deposition of William Boyd.)

ber off the Silvey claims; that was the fall of '92 and the winter of '93. At the time I cut the timber from the Silvey claims, no other timber had been cut there—that is, no logging timber; I can fasten the date in my mind, inasmuch as it was the election fall, the presidential election when Cleveland was elected. I recently visited said section 22; I think it was the 12th of last August; I went over the Silvey claims at that time; I followed the lines through. In cutting the Silvey claims I found I got over the line and cut a few trees from the northeast quarter of the northeast quarter—that is, over the line that divides the northeast quarter of the northeast quarter from the northwest quarter of the northeast quarter. When I went over these two Silvey claims on August 12 of last year I recognized the cutting as having been done by me at an earlier date. Before I revisited that ground on August 12, 1912, I did not know that I had gone beyond the boundary of the Silvey claims when I cut same in the fall of 1892 and the winter of 1893; I had not been on that part of the ground from the time I had logged it until here last August; I don't know how I made the mistake; never could understand it; never could [480] figure out how I got over that line there; I did not intend to go beyond the boundary of the Silvey claims in the location I have testified to; I had no intention of getting over the line at all. At the time I was cutting the Silvey claim and inadvertently got over the line, as I have testified to, I was working for W. H. Hammond or the Big Blackfoot Milling Com-

(Deposition of William Boyd.)

pany. I was not working on a salary; I was working under a contract; I had a contract for cutting and putting these logs into the Blackfoot off the Silvey claim. While I was cutting under contract for the Big Blackfoot Milling Company, I had instructions from W. H. Hammond not to go over the line and not to get into Government timber. I am familiar with the northwest quarter of section 34, township 14 north, range 14 west, also known as the Elijah Cunningham claim. I cut a part of that claim; that was in the fall of 1892 and the winter of 1893—the same time the Silvey claim was cut. As to the portion of that northwest quarter of section 34 that I cut, it was the part that sloped toward Little Fish Creek, the locations were sloped toward Little Fish Creek; that would be, I should say, the southwest portion of that section that I cut over. I found no evidence of any previous cutting of timber thereon. A part of this claim had been cut before I went on to it and I cut up to the old cutting. I am familiar with the claim known as the Kilburn claim, comprising the west half of the southwest quarter, the southeast quarter of the southwest quarter, and the southwest quarter of the southeast quarter of section 20, township 14 north, range 14 west. I owned that claim once. I bought it from McKinnon and McLaren, that was in 1898. At the time I bought that claim I noticed there was some timber cut on it, some ties, old ties [481] lying there. There was not a very big amount of it cut, if there would have been, I would not have bought

(Deposition of William Boyd.)

it, I would not have bought stumps. I examined this timber at the time I bought it and I cut timber on it—I don't remember how much—probably no more than two hundred and fifty or three hundred thousand feet, along there some place, I am not certain. The snow came on and I had to start hauling on account of going to haul on the other side of the river, hauled the logs I had cut in section 16.

Cross-examination.

I was born in Canada and came to Montana in 1884. I first commenced to work for W. H. Hammond in 1888.

Q. Did you ever work for A. B. Hammond?

A. Well, I don't know whom I was working for; I was working for the Hammond outfit, anyway.

(Witness Continuing:) I don't know whether A. B. or W. H. owned it. It was the Hammond outfit and was known as such throughout all that country. I don't know whether anybody knew whether it was A. B. or Henry Hammond, but I always done business with Henry Hammond. I don't know who owned it. I never had any business with A. B. Hammond at all; he never asked me any questions at all. I think I worked for W. H. Hammond along about nine or ten winters. Since I quit logging for Henry Hammond and the Big Blackfoot Milling Company I have had no business dealings with them. I don't know how long I owned this Kilburn claim on section 20—not very long. I sold it to Vogel. I cut some timber off it. I testified a while ago I cut something like two hundred and fifty or three hundred



(Deposition of William Boyd.)

thousand feet. Before that there had been very little timber cut on it. [482] I did not scale up to see how much had been cut before that. I did not pay a great deal of attention to it. I believe I got \$1400.00 for that Kilburn claim. I did the cutting on the Silvey claims in the fall of '92 and the winter of '93, the same time I cut off the Elijah Cunningham claim. Under the contract under which I cut off these claim, I believe I got \$3.00 for the Silvey claim and \$3.25 for what I got off section 34—that was for cutting, logging and banking the timber from these two tracts of land. I might have been on the south side of the Silvey claim different times from the time when I cut it until I went back there on August 12, 1912. I lived right close there the next summer for a while and used to pass through. It must have been about twenty years since I had been on the Silvey land. When I was cutting on the Silvey land, we had a man run the compass tracing out the lines of the Silvey claim. It was all blazed out. I did part of the blazing myself. I was looking for logging business then and George L. Hammond came over and showed me the lines, some of them were partially blazed out and some of them were renewed. I did not know at that time that I had cut over the line on the east side. I did not observe that until the 12th day of August, 1912. I must have seen the line blazed out over which I cut in 1891 and 1892, but I did not notice it. I was particular at that time in following the instructions of W. H. Hammond not to go over the lines. I got over for some reason



(Deposition of William Boyd.)

or other; I never could figure it out any more than there might have been trees blazed along there. I knew where the line was. I disobeyed Hammond's instructions because I happened to do it. I did not intend to go over that line at all. I did go over it. I banked these logs and they went to the Bonner Mill. I never [483] heard of any objection from Hammond, or anyone else, about receiving those logs. John Hammond scaled part of those logs and Ed Gregg was on the job that year, scaling. A fellow by the name of Barrett rescaled that winter on the landing. I have seen the scaling sheets that were made out when they were scaling timber off the Silvey claim. I don't think there were any logs marked on these scaling sheets as having been cut off the line over the east half of the northeast quarter of section 22. If the scalers had noticed it, they would have marked it. I did not notice any mark that way.

Q. You did not see any memorandum made there indicating the logs that were cut off the Silvey claim and those that were not cut off it, over on to the east line?

A. I think not, I don't know, but I don't think anybody had discovered it.

Q. Calling your attention to the time you cut over the line, as testified, in section 22, did you report to anyone about cutting beyond the line at that time?

A. No, I did not know it.

Q. So far as you know, the Company knew nothing about your having cut beyond the line?

A. I don't believe the company knew anything about it; sure they didn't know anything about it.

**[Deposition of John C. Hammond, for Defendant.]**

The deposition of JOHN C. HAMMOND, a witness called and sworn on behalf of the defendant, was offered and read in evidence by the defendant, as follows:

**Direct Examination.**

I reside at Coeur d'Alene City, Idaho. I am a lumber scaler and estimator by occupation. I was born in the State of Maine and am sixty-six years old. In the fall of 1891 and [484] winter of 1892, I was scaling for Ernest R. Kilburn. I was making my headquarters at the Fish Creek Camp, Headquarters Camp. Kilburn was cutting logs from the Sontag claim and part of the Cunningham claim, and I was scaling these logs. The Cunningham claim that I refer to is the Elijah Cunningham claim, and my duties in connection with the scaling on the Cunningham claim and the Sontag claim were the same—though I kept separate scales. I remember William H. Longley and his family well. I remember his claim on the Blackfoot River, about twelve miles east of Bonner. I think it was in 1892 that I did some scaling on that claim; he had cut some logs there; a fire had gone through it and there was somewhere in the neighborhood of two hundred and fifty or three hundred thousand feet of logs cut. I scaled these logs and while I was scaling them stopped there with the Longleys. I was there two or three days. These logs were sap stained, that is, they were burned and the sap of the logs was all stained black or rather blue. During the fall of

(Deposition of John C. Hammond.)

1892 and winter of 1893, I scaled for William Boyd. He cut the Silvey claims; Silvey had two claims. He cut those and he cut the balance that was left on the Cunningham claim and cleaned up section 34; there was some logs on section 34 that the company got a permit to cut. That was the same Elijah Cunningham claim that I have testified to as having been partially cut by Mr. Kilburn. As to the length of time I was working up the Blackfoot River in connection with W. H. Hammond, I went to work there in 1888 and worked there for W. H. Hammond until 1892, and then I think it was the Big Blackfoot Milling Company; I kept on working for them. I left their employment about 1896 or 1897. During the time I was in the employ of W. H. [485] Hammond and the Big Blackfoot Milling Company, I received my orders and instructions from W. H. Hammond and George L. Hammond. I never received any instructions from A. B. Hammond. I received instructions while working for the people mentioned from W. H. Hammond and from George L. Hammond to look after the sawyers and see that they did not get across the lines.

#### Cross-examination.

I am a double cousin of George L. Hammond and A. B. Hammond. I first met A. B. Hammond when we were children. I met A. B. Hammond in Helena when I first came to Montana. He had a lumber yard in Helena and I met him there. I had no conversation with A. B. Hammond prior to coming to Clinton about my employment in the lumber busi-



(Deposition of John C. Hammond.)

ness here. At Clinton I met George Hammond. I accompanied George Hammond on a trip up the Blackfoot and remained at Fish Creek Camp for six or seven days, and was then taken sick. I was regularly employed in 1888. The first scaling I did for Hammond was in the fall of 1888. When I was doing the scaling I had no supervision over any of the cutting more than to look after the sawyers, to see that they didn't get over the line. Once in awhile, I found a place where they did get off the line—very seldom.

Q. Did you make a separate report on your scaling sheet, when you cut off the quarter, or would you just bunch that?

A. I remember sometimes where they started to cut over, we stopped them.

(Witness Continuing:) When I found trees that were down, they were left there. I don't know whether they were left there permanently or whether they were put in the drive. I couldn't tell after they got into the river whether they came off one quarter or off another. [486] George L. Hammond would give us the portions of land from which the timber was to be cut and the lands on which I was to scale timber that had already been cut.

Q. Did you get any of those from W. H. Hammond?

A. Well, we got them this way. He would tell me to go up there and to start with such and such a man on such and such a section; that would be about all. George L. Hammond run the lines; I used to run



(Deposition of John C. Hammond.)

them with him. These were section lines, but if it was necessary, we would run a quarter section.

(Witness Continuing:) In reality, I cannot say of my own knowledge that any of that timber was ever rejected and kept out of the drive, because it had been cut over the line. I was in and around Headquarters Camp from 1887 to 1893, and during that time I never saw A. B. Hammond up the Blackfoot. I was paid for my services by the month. If I happened to be at Bonner, I was paid in cash and if I was up there, they would send me a check. The check was drawn on the First National Bank of Missoula, and W. H. Hammond, if he was not gone, he would sign them; if he did not, then the book-keeper did it, or the treasurer. A man by the name of Young was treasurer for a long while and then there was another by the name of Harrison. During all the time I was working from 1887 to 1893, I used to see A. B. Hammond when I came to Missoula. I had never any conversation with him about the cutting of timber. He never talked logging to me at all, from the first I saw of him in this country until I left him, never a word. He would ask how I was getting on. [487]

Jack Cunningham was on Nine Mile Prairie; that was before my time. He was at the old Headquarters Camp the fall of '87, when I took sick; he took me down the river in a batteau to Bonner. I know where Sunset Post Office is, and I scaled in that vicinity in the fall of '88 and the winter of '89. I knew J. M. Boles. I never heard of there

(Deposition of John C. Hammond.)

being any trouble between Mr. Boles and Mr. Hammond about driving the logs out from the south of the house there. I don't remember whether I scaled any south of the Sunset Post Office in the winter of '90 and 1891; I don't know who logged there. It was the winter of '88 and '89 that I scaled in the vicinity of the Boles' house; I think that was section 1; I did not scale any even section in there; I did not scale any in section 18, township 13 north, range 14 west; I have never been over it at any time to see whether or not it had been scaled or cut, so I don't know when that was cut.

#### Redirect Examination.

It was in 1890 that I scaled on Belmont Creek and when I scaled on the claim of William Longley, it was on the same side of the river as that on which Mr. Longley's house was situated; I am sure of this because I went there and stopped with Mr. Longley and his wife and family. The Longley house is situated on the left-hand side of the river going up stream; I think that is the west side, but I am not sure as to the points of the compass; at that time Longley had built himself a good new house and there was another shack there and a barn, and these were all on the same side of the river; all the scaling I did was on the side of the river on which Longley's house was situated; I didn't do any on the opposite side of the river; as to this sap stained timber on the Longley claim, [488] about which I testified, the fire had gone through where the timber was logged; some of the trees had fallen down, or blown down,

(Deposition of John C. Hammond.)

but the fire had gone through there and burned in the neighborhood of two hundred and fifty or three hundred thousand feet; I sent the scaling sheets to Bonner; they were addressed to the company; I don't remember whether any were addressed to the Blackfoot Milling and Manufacturing Company. I know I sent scaling sheets to the Big Blackfoot Milling Company.

*Recross-examination.*

I might be mixed in the dates as to when these corporations and concerns were running that mill. I cannot tell you now the date when each one was in existence, nor to which one I sent my scaling sheets for any particular time.

Q. It was all supposed to belong to some of the Hammonds, and that was about all you knew about it?

A. That is all I knew about it. I knew this about it, at the time I don't know who owned the property, but W. H. Hammond, that is Henry Hammond, he had leased the whole thing and the business was done under his name. I don't know what the terms of the lease were, or anything about their business at all.

*Redirect Examination.*

Q. I will have to bother you a little about these dates: You have testified that in the fall of 1891 and the winter of 1892 you worked, scaling, where Mr. Kilburn had cut; is that correct?

A. Well, the only way I can get it is to go back to the first year I was up there, that was the fall of 1888 and the winter of 1889, when I worked at Bob



(Deposition of John C. Hammond.)

Moore's camp at Elk Creek; the next year was the fall of 1889 and the winter of 1890, that [489] year I scaled for Jack Dunnigan, opposite Ovando; the next year I scaled for Jack Dunnigan again down on Belmont Creek.

(Witness Continuing:) In the fall of 1891 and the winter of 1892, I scaled for Kilburn; and the next logging year after that, the fall of the next year and the winter months following, I scaled for Boyd on that same ground; it was a good long while ago and I never kept a record of those places, but I can state from where I began and follow it right down through.

Tuesday, January 28, 1913.

**[Testimony of G. W. Fenwick, for Defendant.]**

G. W. FENWICK, a witness called, sworn and examined on behalf of the defendant, testified as follows:

Direct Examination.

My business residence is in Eureka; my family is at the present time living at 2910 Piedmont Avenue, Berkeley; I am vice-president and manager of the Hammond Lumber Company interests in Northern California, and my headquarters are at Eureka, Humboldt County, California; I have resided in California twelve years; my wife is Mr. A. B. Hammond's sister. I first went to the State of Montana in the early fall of 1883, and engaged in the lumber business at that time at Wallace, fifteen or seventeen miles east of Missoula, in the Hellgate Canyon. The



(Testimony of G. W. Fenwick.)

Montana Improvement Company was my employer in the Hellgate Canyon about two and one-half years. I have been in court here and am familiar with the lands involved in this case in the Hellgate. I am not very familiar with the Blackfoot. No lands connected with the Wallace Mills are involved in this suit. Wallace was eight miles down stream from Bonita—west of Bonita. I entered my employment in the Montana Improvement Company in the early spring of 1886. The Montana Improvement [490] Company ceased logging at the Wallace Mills in 1884 and business was cleaned up in 1885. After I ceased my employment with the Montana Improvement Company I purchased the mill of Fred A. Hammond at Bonita. That mill was located on section 14, township 11 north, range 16 west. I made that purchase in May, 1886. I conducted my negotiations with Fred A. Hammond for that purchase. There was no written conveyance from Fred A. Hammond to me conveying the property in question. The property was carefully inventoried. I had a complete inventory of all the property made. I paid Fred A. Hammond about \$25,000.00 for the property—\$25,000.00 or \$27,000.00—I don't recollect the exact amount. At the time of that purchase there was a mill erected and in operation upon section 14, at Bonita. That mill had a capacity output of about 20,000 feet of lumber per day, on the average, every day it ran. The value of such a mill at that time, in its then condition when I bought it, including railroad spur connections and the general buildings like

(Testimony of G. W. Fenwick.)

a cook-house and other necessary buildings, was about seven or eight thousand dollars. In addition to the mill, I acquired a complete logging outfit in the way of teams, trucks, sleds and logs and also logs that had been banked or partially gotten out in the winter of 1885 and 1886. There was a quantity of sawed lumber in the yard. At the time I purchased the mill at Bonita, I was familiar with the land in the Hellgate River country. I was up and down there at all times for a year or two before that. As to the general appearance of the Hellgate Canyon at the time I knew it, prior to the time that I became the proprietor of the Bonita sawmill, as the name implies, it was a canyon; that is, in most places the mountains arose abruptly from the river on [491] either side. Here and there were gulches that came in, along which logs were taken out. On the south side, the mountains, in almost every case along the river, rose precipitously from the river to a great height; on the north side of the river, starting slightly west of the mill on section 10, that was the only ranch property. There was quite a flat there of probably two or three hundred acres of good bottom land. That was the only ranch between that and the section on what is known as Tyler Gulch, township 11 north, range 15 west. I don't think there was anything raised at all in the way of vegetables, or hay or grain along there outside of on the Cramer ranch at that time. As to the distance between the bed of the river and the mountains that arose to the north and south of the Hellgate Canyon,

(Testimony of G. W. Fenwick.)

on the south side there was a little flat in section 12, township 11 north, range 16 west, and running back a few hundred yards, then the mountains rose very precipitously. In section 7, township 11 north, range 15 west, there is a flat there extending in back into a canyon running out of section 6, in said township, and widening out to a flat on section 7. The canyon runs down from section 6 into section 7. On section 12, township 11 north, range 16 west, just below that on the north side of the river, the mountains there rose very abruptly from the river, almost perpendicular, to a great height. In regard to sections 6, 18, 17, 20, 21, and 22, in township 11 north, range 15 west, it is all a steep gulch, steep mountains on the south side, along the whole south side of the river. At said section 22, there was a little flat running for about 100 yards. The Northern Pacific Railroad had been built two or three years before I purchased the Bonita Mill, and it ran through the Hellgate Canyon. That railroad [492] crossed the river, I think, three or four times between Bonita and a place in section 26, in township 11 north, range 15 west, known as Tyler's Gulch or McCarty's Bridge. The county road at that time ran on the north side of the river. At the time I knew this Hellgate Canyon and before I purchased the Bonita Mill, there had been a mill south of the river on section 12, in township 11 north, range 16 west. This was on the flat land I testified to. At that time the river ran more to the north on section 12. It has been changed by the Northern Pacific and the Mil-



(Testimony of G. W. Fenwick.)

waukee Railroad coming through there. That mill was known as the Haycock Mill. It was not in operation after I purchased the Bonita Mill. When I came to Bonita, the Haycock Mill had been closed down a few months before I came. It had been cutting over the flat on that section. I visited the Haycock Mill and in the vicinity of the property I saw three or four hundred thousand feet of heavy timber and boards and piling up there in the yard, stacked up in regular shape. There were bridge timbers and railroad ties and inch and two inch lumber, mostly. The term "cribbing" or "cribs," used in railroad construction, applies to timbers that have been hewn out on two sides, thereby giving them two flat sides and they are used for cribbing up and for culvert work. By cribbing, I mean supports on the sides of the culverts, the timbers lying on the flat side. Stulls are round trees or round logs, used in mining to support the square timbers. Regular logs were taken for stulls throughout the Hellgate. There would be no difference in the appearance of the ground if timber had been felled for stulls or if it had been felled for saw logs. The logs would be removed just the same as if they were being removed to a sawmill; [493] nor is there any difference in the character of logs taken to the mill and sawed for the purpose of railroad construction and those logs used ordinarily in running a mill. All sizes of timber are used in railroad construction work from 6x8, perhaps up to 8x16 or 12x12. Five or six logs on the average in that part of the country would



(Testimony of G. W. Fenwick.)

make a thousand feet of lumber. The average timber was ten or twelve inches in diameter. Piles are cut in the woods, and while they may be barked, sometimes they are hauled in round shape, and while sometimes square piles are driven, generally they are driven in a round condition by the pile-driver. They run as large as it is possible to drive them in or get them through the gin, which is about 18 inches at the top. I knew of piles being used in the construction of the Northern Pacific. I saw hundreds of thousands of piles being used on the Northern Pacific. The dimensions of these piles would be as follows: At the top or small end they would run as low as eight inches in diameter; at the butt end as high as sixteen or eighteen inches in diameter, just as large as they could get them through the machine. There was no difference whatever in the appearance of a stump after the tree had been logged for a pile than when it had been logged for cutting lumber in a mill. When I arrived in the Hellgate country, I saw thousands of piles lying along the right of way at different points on the Northern Pacific, from McCarty's bridge on section 26, township 11 north, range 15 west, to Wallace, down below on the Hellgate. In all the bridges in the Hellgate Canyon there were piles driven at the approaches and in all the dry gulches, and in fact, the greater part of the original work done was pile work. Of course, in the case of bridges, [494] they would drive the piles and put the caps on, then put the stringers on, making a trestle. There was an immense amount

(Testimony of G. W. Fenwick.)

of logs that would otherwise have been suitable for mill logs, used as unsawed piling along the line of the Northern Pacific Railroad within the vicinity of the Hellgate Canyon. I cannot give an estimate. As to any particular part of a railroad or bridge which contained piling, the greatest amount of piling nearest to the Bonita Station was in a bridge across the Hellgate River less than half a mile from the mill, and I would say, taking the approaches there and the trestles that led up to it between the Beaver Tail cut and that bridge, there was three or four hundred thousand feet of piling; that is a very approximate estimate. Railroad ties are used at the rate of about 2,500 to a mile of railroad construction, that is, a tie to every two feet. There are 32 feet, board measure, of lumber in each tie. By board measure, we mean the reduction of a piece of lumber to actual board measure—a board 12 feet long, 12 inches wide and 1 inch thick would have 12 square feet. The unit of measurement is a board 1x12x12. Ties are used, both sawed and hewn. On bridges, it is customary to put in sawed ties. On railroad work they were mostly at that time on the Northern Pacific all hewn ties, that is, faced on two sides. Of course, a tie was not necessarily a very large stick of timber; the face would be from 6 to 8 or 10 inches; an 8 or 10 inch face would be quite a tree, 5 or 6 inches would be small; a 5 or 6 inch tie would take a tree 8 or 9 inches in diameter. An 8 or 9 inch tree is suitable for logging purposes; it is cut into small dimension stuff. In the early days they

(Testimony of G. W. Fenwick.)

did not cut so much of that size. I knew of trees being felled and they would leave the butt or first two cuts in the woods on [495] account of its size. When they got up to where it is 10 or 12 inches in diameter, about 10 inches in diameter, they would cut it into ties. A saw tie would be taken from an ordinary saw log. Prior to the time of my purchase of the Bonita Mill, wherever I cruised for timber along the Hellgate, I observed the extent of cutting and I observed it contiguous or close to the river and more especially on section 12, township 11 north, range 16 west and sections 18 and 20, in township 11 north, range 15 west. In those handy sections there, I found evidences of timber having been cut there before, more especially on the south side of the river, because it was handy to the river. I found it on both railroad lands, or odd sections, as well as on government lands. Close to the river there were stumps all along the river scattered through the timber. By close to the river, I mean more especially within an eighth or a quarter of a mile from the river—depending upon the topography of the land. If the mountains rose abruptly from the river, the operations did not extend up into the hill very far. I never sold any lumber to the Montana Improvement Company; I sold lumber to the Anaconda Mining Company. I stood in the relation of an agent to the Anaconda Mining Company. I had my mill and my logging equipment and I had contracts extending over a number of years. My contract was in writing. I don't know what became of it. That is



(Testimony of G. W. Fenwick.)

twenty-five years ago. I could not find it. I had a copy of that contract myself and the Anaconda Mining Company also had a copy. I asked them for the copy two or three years ago. I made a search for them and they were all gone. None of my contracts were ever placed of record. As to the terms of these contracts, they required that I cut [496] and deliver on the cars a certain amount of mining timbers and small material at a certain price; the understanding being that I was to provide the teams and manufacture the lumber, and compensation was given to me as agent at the rate of a certain amount per thousand feet for said material on the cars at Bonita Station. Any lumber that the Anaconda Mining Company were unable to take, I was allowed to sell to outside parties. The contract was between Marcus Daly of the Anaconda Mining Company and G. W. Fenwick, who had a mill at Bonita Station. It was agreed that Fenwick had a sawmill and was the owner of teams and he agreed to furnish Mr. Daly a certain number of million feet of mining timbers for his mines; Daly, in turn, appointed Fenwick on the other side, as agent, to do this work for the Anaconda Mining Company. The compensation for the agency for doing the work was to be at the rate of a certain fixed amount per thousand, which varied, some years with another, for the timber on the car. I have given, as nearly as possible, the substance of that arrangement. It provided for the size of the timbers, but those are matters of detail. I cut timber under that arrangement practically



(Testimony of G. W. Fenwick.)

during all the time I was operating the mill at Bonita. The character of the timber that I cut was mostly 10x10 square timbers for the mines and two inch planking, and then ordinary dimension lumber for buildings around the mines, but the large part of the timber would be mining timbers and planks. In regard to the cutting charged in the complaint in this case, I cut on some of the sections named therein; I cut some on section 2-11-16. I am not so sure as to whether I cut any on section 10-11-16. I could not state positively I cut any there, because I might have been on railroad land south of that or north of that. I cut some [497] on section 14-11-16, where the mill was; I did not cut any on section 12-11-16 south of the river, but I am inclined to think I cut some on that section on the north side of the river. I am not sure. Section 6-11-15 is Rich's Gulch. I did not cut any timber on section 6 coming out of Rich's Gulch, that I know of. I did not cut any timber on section 8-11-15 at all. I did not cut on any section south of the river west of section 26-11-15 other than on section 14-11-16, as already testified to, with the exception of a few logs cut off a corner on a little place close to the river on sections 20 and 22-11-15. I did not cut any on section 18-11-15. On said section 22 I cut a narrow strip on the south side of the river. Those logs were dragged or go-deviled to the river. There was no trucking sledding of logs anywhere on the south side of the river between section 14-11-16 and section 26-11-15. All that I took either from section 20 or from

(Testimony of G. W. Fenwick.)

section 22, in township 11 north, range 15 west, were go-deviled to the river. We go-deviled to the river a hundred or two hundred yards. It was not customary to go-devil for a greater distance from the river than that. We did what we call shore logging. Where I took these logs from section 22-11-15, there had been previous cutting of logs there, evidenced by the stumps. As to the trees that I cut on the south side of the river, I may have cut larger trees than those that had been cut as evidenced by the stumps remaining. I would naturally take the best trees, but I do not know that I can state there was any marked difference between the stumps of the trees that I cut and those that were cut before. There were stumps of the same character that were left behind resulting from my own cutting. As to section 26-11-15, I may have cut some myself in the northeast corner of it. I would not be sure that I crossed the line. There were no lines run there and I could [498] not determine it. We logged from that vicinity a matter of a couple of weeks with a small crew and I may have cut in that corner. I never cut more than the one time in that section. In addition to that cutting there, I employed a contractor in that vicinity. He was on section 23, directly north of it. That would be in the winter of 1889-90, I think. From a careful examination made since that time, I am satisfied he did not cut at all on section 26. I have been over the ground since then. The bulk of the cutting was on section 23. In reference to section 14-11-16, before I purchased the

(Testimony of G. W. Fenwick.)

mill from Fred Hammond, there were some evidences of timber having been cut there. I did little or no logging on the north half of section 14, from the fact that it was a place where we turned out our horses, pasture land. The river ran through a part of it and we had our logging pond there; in the other part, in the northeast quarter, there was a cottonwood swamp and in the northwest quarter—there were very few logs cut by anyone on the north half of section 14. As to the south half of section 14, I cut some logs on it. I never regarded section 14 as good timberland at all. Gillespie Gulch ran north towards the river and extended up into section 23 immediately south of that—a mile probably. There seemed to be two gulches known as Welch's Gulch, as was brought out in the depositions of the different witnesses read here. The main Welch Gulch was on the north side of the river, running through the southeast corner of section 2, and up into section 1, all in township 11 north, range 16 west; that is what was known as Welch's Gulch over there. The mouth of the gulch was on the north side of section 11, right up on the north line of section 11-11-16. The other Welch Gulch was on the south half of section [499] 14-11-16. In the southwest portion of 14, right near where Harper and Baird's operations were. After I left there, Welch Gulch, what was known as the John Welch Gulch, was near the center of the section. My recollection is that while I was there the Welch Gulch was in the southwest quarter. I testified that when I went there I found



(Testimony of G. W. Fenwick.)

evidences of timbers having been taken and ties for railroad purposes and piles. The appearance to-day of this land in section 14 south of where my mill was, as compared with its appearance at the time I went away, is that when I left there in 1890, standing at the millsite and looking up the side hill towards the south half of section 14, it was still forest. You could not tell at a distance that there had been any trees taken off the south half of section 14. The forest looked to be in its primeval state. Its present condition now is that there are farms in there, several ranches in there. The small stuff is cut off and a fire has gone through it. I do not know where the records of my mill are. This was twenty-five years ago. I last saw them years before we sold out at Bonner. I have no idea what became of them. I dismissed them from my mind. It was a wholesale business and they were not preserved. I have a general idea what the bulk of my business was, but not over one section like that. I did not attach much importance to section 14 because I did not consider it a well timbered section. At that time I did not know the particular section on which I was doing the cutting. It was not surveyed at all. None of the land there was surveyed, except the Cramer ranch. At the time the cutting was done, there were no lines or corners. I did not know I was on section 14 then. When I examined the property last September, I looked at the stumps on section 14. South of the river I observed that a fire had been over that [500] section in places. I would not say it had



(Testimony of G. W. Fenwick.)

been over all of it. There was nothing in the appearance of the stumps there from which I could tell what had been taken by me and what had been taken by others. I have been familiar with timber cutting since 1883, and more or less in Canada before I came here, although I was not a practical logger. I have been continuously in the lumber business since 1883, and I am familiar with the woods and all forms of the lumber business. There was no fire through this country while I was engaged in milling there, but all through this country I saw evidences of fire, especially on the south side of the river, since I had my mill there. As to section 10-11-16, we logged some on the side hill, but I am not positive as to any definite amount taken on that section. Beaver Tail Hill ran up on the west side of section 11 and the west side of section 2, in township 11 north, range 16 west. The end of Beaver Tail Hill was directly opposite the mill. It ran about two miles up into the west part of section 2 and section 11, in township 11 north, range 16 west. I did not take any trees on the southeast quarter of section 10-11-16. I did not log in there myself. I think I cut timber off the north half of the northwest quarter and the northwest quarter of the northeast quarter—that north tier of forties in said section 10. I took along that side hill; of course, I don't know where it was. I don't know very well yet. I don't know of my own knowledge. With reference to this neighborhood, there are other sections not involved in this action from which I took timber; I took timber from the

(Testimony of G. W. Fenwick.)

north and I may have taken from the west. I am not positive about it. I am not able to tell how much timber I took from that entire section of country to the north, east and west; if I took any from that section 10, [501] I am not able to say how much I took. Cramer Gulch was on the west side of section 2 and the east side of section 10, in township 11 north, range 16 west. It runs west of Beaver Tail Hill, parallel with it on the west. It extends up into section 2. I have been in section 2 in the same township. I have been in this section 2 since it was surveyed. I know where the south line of section 2 is. I had it definitely pointed out to me by an engineer. At the time of the so-called log war, I know where Thompson was cutting and where I was cutting, and I have examined section 2 with reference to the location of the log war. That log war extended on the east side of Cramer Gulch, down south of the north line of section 2. The character of the country into which it extended was level—right along the gulch, and heavy timber. There was no difficulty in hauling logs from the lower part of that gulch up to where the Thompson people had their mill. It was only a matter of a quarter or a half mile, and it is practically level. It might be about a 1% grade. The main road runs up the canyon, and the greater part of that I built. It was over a swamp. All the country is practically denuded up there now. In that section 2, when I left it, the best of timber was cut.

Q. With reference to the taking of logs, how far

(Testimony of G. W. Fenwick.)

into the territory that you took logs from did they come, how far into the territory where you were taking logs did they go?

A. We cut right through each other on sections 2 and 35, in township 12 north, range 16 west. We had skidways there where the log war was being carried on and they felled their trees right on to our skidways. I have no recollection as to how much I took off that section. I have no means at this date of determining or ascertaining which ones of the stumps left there represented trees taken by me and which [502] of the stumps represent trees taken by the Thompson outfit.

(Witness Continuing:) I do not know whether I took any timber from section 2-11-16 that went down Welch's Gulch. I may have. If I did, I probably took a couple of hundred thousand feet. I am uncertain with regard to it because the operation there extended into section 1, township 11 north, range 16 west, as testified to here by Robert Harper for the prosecution. I am uncertain as to whether I cut there or not, inasmuch as if there was any cutting done there, it was by contract. I have no personal knowledge of any cutting on section 2 in the vicinity of Welch's Gulch of logs that went to my mill. In regard to section 12-11-16, I did no cutting on the south side of 12 at all. I am not positive I took any logs on section 12, I think I did. If any were taken off section 12 by me, they came down off the side hill near the river. I never took any far back from the river on section 12 at that time. With



(Testimony of G. W. Fenwick.)

regard to section 6-11-15, I took none off section 6—I took none off Rich's Gulch on that section. I took no logs off section 8. I have been on the south lines of each of these sections. The corners were pointed out to me of the south and west lines of section 8. Mr. C. E. Woodworth, an engineer, was on the ground with me on section 8. Mr. Wills was with me on section 7. Robert Harper logged on section 8 and Dan McQuarrie logged on section 6—all these in township 11 north, range 15 west. Robert Harper did not have any of his people do any logging on said section 8 for me. On section 8 there was a sawmill to my knowledge in 1897, 1898 or 1899. There was a mill there for several years; that was called Harper and Baird's mill. That is about a half or a quarter [503] of a mile above the south line of that section 8. I don't think I testified that I took any logs from section 18-11-15 at all.

Q. I understood you to say that you had taken some from along the river? A. Perhaps so.

The COURT.—You stated near the river you did what you call shore logging?

A. Yes.

(Witness Continuing:) I don't think I took any off section 18. Off of that corner of section 20-11-15, from personal inspection, I think I logged that corner. There were evidences there of stumps before I did any logging there—stumps all along the river. I have no means of stating how many logs I took from said section 20. I could not tell from an inspection of the ground whether the logs that



(Testimony of G. W. Fenwick.)

were taken from there went to my mill or went to other persons. Since I operated there all kinds of mills have been in that country. With reference to the logging that was done on section 22-11-15, I have no method of telling how many logs went to my mill. There were no lines and no corners upon those lands and no land marks that would define my location when I operated there; so with regard to section 26-11-15, I testified that I logged there for about two weeks; I have no method of telling what logs were taken from that section. I have been over the ground since. It has been cut over since the logging was done there by me.

Q. Where, with reference to the place that you logged has the logging been done? [504]

A. The northeast corner, very near the corner, is where the mill was located and there is evidence still there of sawdust piles—the northeast corner of section 26. It is either on 26 or 23, the adjoining section that the mill is, very near the corner. There is evidence of extensive logging operations on what we call Tyler Creek.

Q. Where, along the Tyler Creek, with regard to the two weeks' work that you say you did there, was the logging done?

A. Further up the creek, on both sides of the hill, six or seven hundred feet above the bed of the creek.

(Witness Continuing:) When I was on the ground recently in that section 26, I saw coppering done in the northeast corner of that section. By coppering, I mean placing a piece of rock or bark on a stump, to indicate that it has been counted.

(Testimony of G. W. Fenwick.)

With reference to the work that Idid during that two weeks, in section 26, I found the coppering done further up on the hill; further away from our operations. I certainly had not cut the logs up in the hills where I found these stumps coppered. At the time I purchased this mill, the negotiations therefor were altogether with Fred A. Hammond. I had no negotiations upon the subject with A. B. Hammond. Fred Hammond was the owner of the mill and ran it. At that time I was living quite near him. Mr. Hathaway's memory is wrong when he stated my relations with Mr. Fred Hammond were strained and that we were not on speaking terms. Fred Hammond and I were on the best of terms. There was a little personal matter there between us which had no bearing on the business. The personal matter came up afterwards, in point of time, to the purchasing of the mill. It cut no [505] figure between Fred Hammond and myself. It was shortly after I purchased the mill. There never was a time when I was not on speaking terms with Fred Hammond. Mr. Hathaway came to take this inventory, because in our negotiations, which lasted some little time, extended over a week or two or three weeks, Fred Hammond and myself agreed to have Mr. Hathaway participate or to act to represent him in taking the inventory. I would look after my own interests and Mr. Hathaway was to help count up the logs and the timber and make up the inventory for Fred Hammond and figure it up and arrive at some price. Mr. Hathaway had nothing else whatever to do with the transaction than take the inventory.

(Testimony of G. W. Fenwick.)

Hathaway happened to be selected to take the inventory because Fred Hammond and myself agreed on him. I don't know how he happened to come there to take the inventory. I may have sent word to him myself or Fred Hammond may have done it, or I may have requested anyone in the office in Missoula to tell him. I know he would have come if I had asked him. The office at Missoula which I refer to—Mr. E. A. Winstanley was the clerical man in that office. Mr. Hathaway was on the road selling lumber. This lumber office was upstairs over the office of the Missoula Mercantile Company; a separate and distinct office for the lumber interests. The stairs led up from the outside. I think it was also the office of the Montana Improvement Company. Regarding Mr. Winstanley's relation to our mill, our mill was located where there was no postoffice and no safe, no place to keep any records, and I could not send my invoices out. I arranged with Mr. Winstanley to do the necessary clerical work in connection with the books. I would report the shipments to Mr. Winstanley, and he would make a proper entry and proper charge and send [506] the invoices to the party receiving the lumber, the Anaconda Mining Company. I paid Mr. Winstanley for his services all of the years he worked for me.

Q. Did Mr. A. B. Hammond have any interest, either directly or indirectly, in your purchase of the Bonita Mill?

A. Not one cent; either directly or indirectly; nor did Mr. Eddy; nor did the Missoula Mercantile Company; nor anybody else, either directly or indirectly.



(Testimony of G. W. Fenwick.)

He had no interest whatever. The matter was a strictly private arrangement between Fred Hammond and myself.

(Witness Continuing:) None of the profits of that business went to any other person than myself. Neither Fred Hammond nor A. B. Hammond at any time shared in my profits; nor did the Missoula Mercantile Company, nor the Montana Improvement Company have any interest in my profits. I did make profits. I cut along that country from 1886 to 1891. During the last two or three years, from 1889 to '91, the operations were small. My operations extended from May, 1886, to May or June, 1891, during the years 1890 and 1891, they were very small. The handy logs were cut away and lumber was low. In 1891 I sold some parts of my mill to McKean and McQuarrie, who had a mill on section 6-11-15, in Rich's Gulch. Some parts of the engine were sold to Harper and Baird, a few years after they had a mill on that section. It was simply junk. The engine and boilers were never moved away from there. Some portions of it I sold and the rest I left. The proceeds obtained from the sale of these portions I kept myself. [507]

At the time I did this cutting I was cutting on unsurveyed lands and before going upon that land, I believed and understood it was what we called mineral land.

Q. State to the Court and jury the basis of your belief at that time that it was mineral land.

A. I was familiar with the Act of June 3, 1878; see Chap. 150, 20 Stats., at Large, 88; that has been



(Testimony of G. W. Fenwick.)

read here to-day so many times. I was aware or was informed by my counsel in regard to the letter approved by the Honorable H. M. Teller, Secretary of the Interior and addressed by Commissioner McFarland to Registers and Receivers and Special Timber Agents, bearing date June 30, 1882, and which is found reported in Vol. I of the Decisions of the Department of the Interior relating to public lands, at pages 697, 698, and 699.

(Witness Continuing:) I might say in reference to Senator Teller's letter, that from the description that he gives of the topography of the country and the geographical conditions of the country, in my judgment this land I was about to cut over was of that character which would bring it within the terms of the letter. That was one of the circumstances that led me to believe it was mineral land. I knew of a placer mining claim being taken up on section 23, in township 11 north, range 15 west. From my investigations at that time, I know that it was patented; I also knew of a claim west of Bonita taken up by a man named Joe Sohll—two or three miles west of the mill on the flat. I was familiar with the mining operations at Wallace, eight miles west of Bonita. I also saw prospectors during the years I was there running the mill. I was familiar with an extensive mining enterprise at Rock Creek a year or [508] two after I closed my operations at Bonita. Rock Creek was three miles west of Bonita. These operations involved an expenditure of a tremendous amount of money, possibly a hundred thousand dol-

(Testimony of G. W. Fenwick.)

lars, or maybe two hundred thousand dollars. That was a year or two after I left Bonita. That was called the Quigley Mine. I was familiar with affidavits that had been made in regard to the mineral character of this section of the country. I think I remember the names of quite a number of men who made these affidavits. I was in close touch and was governed by the advice of my attorney at that time, the late T. C. Marshall of Missoula. I was acting under the advice of my counsel before and during the negotiations that led up to my purchase from Fred A. Hammond. I was led to believe, and I sincerely believed, that I was strictly acting in accordance with the law in going on this land, which I believed to be mineral. I spoke of being familiar with affidavits at the time I purchased the Bonita Mill from Fred A. Hammond. I had probably seen half a dozen affidavits. I don't know, for sure, but several.

Thereupon counsel for defendant hands to the witness two certain affidavits, one thereof purporting to be made and sworn to by H. A. Ameraux, dated November 21, 1885, and sworn to before Thomas C. Marshall, a notary public in and for the Territory of Montana, with notarial seal attached, the other purporting to be made and sworn to by William H. Smith dated November 21, 1885, and sworn to before Thomas C. Marshall, notary public in and for the Territory of Montana, with notarial seal attached. I can identify said affidavits purporting to have been made and sworn to by H. A. Ameraux and William H. Smith as having been seen by me before I made

(Testimony of G. W. Fenwick.)

my purchase of the [509] Bonita Mill.

Thereupon the defendant offered in evidence the said affidavits of the said H. A. Ameraux and said William H. Smith.

That the said affidavits were and are, respectively, in the words and figures following, to wit:

**[Exhibit—Affidavit of H. A. Ameraux.]**

Territory of Montana,  
County of Missoula,—ss.

Before me, Thomas C. Marshall, a Notary Public in and for Montana Territory, personally appeared H. A. Ameraux, who being by me duly sworn, on his oath deposes and says: That he is a citizen and resident of Missoula County, Montana Territory, and has been for years; that he is well and personally acquainted with the land and country lying along the line of the Northern Pacific Railroad between the Town of Missoula and the Town of Bearmouth, in said Territory; that he has frequently passed over said land and is enabled to testify understandingly with regard thereto; that said land is mineral in character and not subject to entry under existing land laws of the United States as agricultural land, and that to his certain knowledge there are many mineral locations and leads, lodes or ledges bearing gold, silver and other precious metals, and that within said limits and near said Railroad is an organized mining district in which are a number of mines now being worked for precious metals; that said country and lands are essentially mineral land and unfit for agricultural lands and are



not chiefly valuable for the timber thereon.

H. A. AMERAUX.

Subscribed and sworn to before me on this 21 day of November, 1885.

[Notarial Seal]      THOMAS C. MARSHALL,  
Notary Public, Montana Territory. [510]

**[Exhibit—Affidavit of William H. Smith.]**

Territory of Montana,  
County of Missoula,—ss.

Before me, Thomas C. Marshall, a Notary Public in and for Montana Territory, personally appeared William H. Smith, who being by me duly sworn, on his oath deposes and says: That he is a citizen and resident of Missoula County, Montana Territory, and has been for years; that he is well and personally acquainted with the land and country lying along the line of the Northern Pacific Railroad between the Town of Missoula and the Town of Bearmouth, in said Territory; that he has frequently passed over said land and is enabled to testify understandingly with regard thereto; that said land is mineral in character and not subject to entry under existing land laws of the United States as agricultural land, and that to his certain knowledge there are many mineral locations and leads, lodes or ledges bearing gold, silver and other precious metals, and that within said limits and near said Railroad is an organized mining district in which are a number of mines now being worked for precious metals; that said country and lands are essentially mineral land and unfit for agricultural lands and are



not chiefly valuable for the timber thereon.

WILLIAM H. SMITH.

Subscribed and sworn to before me on this 21 day of November, 1885.

[Notarial Seal]      THOMAS C. MARSHALL,  
Notary Public, Montana Territory.

To the introduction in evidence of the said affidavits and each thereof, plaintiff objected for the reason that they were, and each of them was, wholly irrelevant, incompetent and immaterial, and on the further ground that each is an *ex parte* affidavit, and an attempt to introduce evidence as to the mineral [511] character of the lands in question by an *ex parte* affidavit under conditions when the plaintiff in this case has had no opportunity to examine or cross-examine the witness testifying as to the mineral character of the land.

Thereupon the Court sustained the said objection of the plaintiff upon the sole ground that said affidavits were, and each of them was, an *ex parte* statement, by which the plaintiff could not be bound; to which ruling of the Court defendant then and there excepted.

**Defendant's Exception No. 13-A. [512]**

I testified that there was a mining district known as the Wallace Mining District, in the vicinity of my mill. My recollection of the Wallace Mining District is that it embraced an area from Missoula to Bearmouth, that is about sixteen miles east of Bonita, that was the base, and the vortex of the triangle was somewhere on the Blackfoot River, taking in land

north of the river involved in this suit. The district did not cover the country south of the Hellgate River. The country south of the river was more precipitous and rough than on its north side; the mountains in most places rose more abruptly direct from the river. There were canyons and gulches, deep gulches, at different places. Through that section it was very rough country, except in section 14-11-16 and section 26-11-15. Describing the country on the south side of the river as to its topographical characteristics, I would say, starting at section 12-11-16 they arose very steeply there a short distance from the river. There was a flat on the south side of said section 12, but after you got off the flat then the mountains rose abruptly. The river has changed since that. The river was more on the north side of the section formerly. The mountains rose abruptly. The next section to said section 12 would be section 18-11-15; there was no flat there; it was very high mountains. There are some gorges or valleys running through it, but not wide valleys like Cramer gulch, but narrow gorges. This would also apply to section 20 cornering on the southeast corner of said section 18—a little strip of land, a little flat, and the rest was very high mountains with ravines cutting through it. There was timber on these mountains, but it was a mountainous country and steep. That would apply also to [513] section 22-11-15, where this Medicine Tree Hill was. The country is steep and rose abruptly from the river, with the exception of a small flat. It was a rough, mountainous country

on the south side of the river, with no wide flats. Small creeks came in on the south side of the river; wherever there were narrow ravines, there were small creeks. There were no wide valleys on the south side of the river. Section 14-11-16 was comparatively flat until you would get pretty well up against the south line; there were a number of creeks come out of there in these gulches that were spoken of, Hutchins' Gulch, Welch's Gulch and Gillespie Gulch, where Harper and Baird's mill was—there was quite a large creek.

Defendant thereupon offered in evidence the organization minutes of the Wallace Mining District, and the said minutes were admitted in evidence and marked Defendant's Exhibit "G," and said exhibit is in the words and figures following, to wit:

**[Defendant's Exhibit "G"—Minutes of Wallace Mining District.]**

**WALLACE MINING DISTRICT.**

At a meeting of the miners and claim owners held at the house of Richard & Klein, at the New Quartz mining camp on Canneas Trail, Missoula County, Montana Territory, on Saturday, the 27th day of July, 1878, the following proceedings were had:

The meeting was organized by the election of W. J. McCormick, Esq., Chairman, and Frank H. Woody, Secretary.

The chairman briefly stated the object of the meeting to be the organization of the mining district, the election of a president and recorder, and such other

business as might properly be brought before said [514] meeting.

Moved and carried that a mining district be *layed* out and organized in the following described boundaries.

Beginning at the point where the Missoula and Deer Lodge county line crosses the Hellgate River, near McCarty's bridge, running thence north on said county line to the Big Blackfoot River to its confluence with the Hellgate River, thence up the Hellgate River to the county line, the place of beginning.

Moved and carried that said mining district be named and called Wallace Mining District.

On motion, R. F. Klein was elected president of Wallace Mining District.

On motion, John T. Richards was elected recorder of said district.

On motion, the secretary was directed to furnish a copy of the proceedings of this meeting to the "Missouliau," and request the publication of the same.

Upon consultation it was deemed best to defer the adoption of a set of by-laws for the district to some future meeting to be called by the president of the district.

The meeting then adjourned *sine die*.

W. J. McCORMICK,

Chairman.

FRANK H. WOODY,

Secretary.



(Testimony of G. W. Fenwick.)

Filed and recorded on the first day of August, 1878.

FRANK H. WOODY,

County Recorder, Missoula County, Montana, [515]

While I was operating the mill at Bonita, I saw Mr. A. B. Hammond there once, I think twice. He was at my house there or the shanty where I was living. That was a little house I was living in near the mill. I remember one occasion he rode in on horseback and stayed a little while; got lunch, probably, I think he did. On another occasion, I remember of his coming there with a deputy sheriff with a subpoena for me to appear as a witness in a suit in which the Northern Pacific was involved.

Q. What acts, if any, of management in the Bonita Mill property on the Hellgate did Mr. A. B. Hammond exercise during the time that you have testified to, from your purchase in 1886 until the time that you gave up the mill?

Plaintiff objected to the question on the ground that it called for the conclusion of the witness, which objection was sustained by the Court; to which ruling of the Court defendant duly excepted.

#### **Defendant's Exception No. 14.**

(Witness Continuing:) During the years I operated there, Mr. A. B. Hammond did not give me any directions as to the management or logging business or anything concerning my operations. Mr. A. B. Hammond personally had nothing to do with the sale of my lumber; nor did he personally have any-

(Testimony of G. W. Fenwick.)

thing to do with the purchase of logs by me; nor did he personally have anything to do with the cutting of lumber by me; or its shipment; Mr. A. B. Hammond had nothing whatever to do with the employing of men by me. I know about Mr. Hathaway's going East for some men, which has been testified to. The facts are these: There was a scarcity of men. That, I think, was in 1887. I would not be sure about the year, but it was [516] during the earlier years of my operations at Bonita. Hathaway was sent to Minnesota to bring out some men—loggers. I think arrangements were made by W. H. Hammond and myself to send him there. He brought out quite a large number of men and I got quite a few of them myself. As to paying Mr. Hathaway for his services in going East for these men, I bore my share of the expenses; I forgot how much it was, but it was divided up among a number of us who were operating mills at the time. Mr. A. B. Hammond did not ever directly or indirectly engage any men to work for me at the Bonita Mill while I was there; he may have told some one that they might go down there—some one might have applied to him for a position, and he may have advised some one to go up there and see what they could do. I do not know of any such instance having taken place. As a matter of fact, in the employment of men, I employed the men—all of the men myself. I had a small commissary store at my mill for supplying the men chiefly with such goods as they required in the way of clothing, boots, shoes and tobacco, and also supplies from the cook-

(Testimony of G. W. Fenwick.)

house that some families would purchase that lived there, such supplies as were not carried in the store proper. I bought in wholesale quantities my mill supplies and commissary supplies from the Missoula Mercantile Company. I would buy beef, hay and grain from the ranch men, from the Cramer Ranch, that is about the only one that was there. I sold goods at my store or commissary at a profit. I paid the wholesale price and sold at a profit. I did not divide my profits with any person or corporation. I absorbed them, kept them myself. No persons, either directly or indirectly, had any interest in those profits other than myself. [517] While I was operating the mill at Bonita, I did not sell any lumber to the Missoula Mercantile Company. Mr. A. B. Hammond did not, nor did any firm or corporation with which he was connected, purchase any lumber from me at any time while I was operating the Bonita Mill.

*JB.*  
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